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# Supreme Court of the United States

**OCTOBER TERM, 1969**

**No. 1251**

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PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL., PETITIONERS

*vs.*

REDERIAKTIEBOLAGET TRANSATLANTIC

---

VOLUME I

**Petition for Certiorari Filed February 27, 1970**
**Certiorari Granted April 20, 1970**

CIVIL DOCKET
UNITED STATES DISTRICT COURT

**Jury demand date:**

D.C. Form No. 106 Rev. C.A. 65-640-W

**Title of Case.**

PORT OF BOSTON MARINE TERMINAL ASSOCIATION,
MASSACHUSETTS PORT AUTHORITY,
THE MYSTIC TERMINAL COMPANY,
PORT TERMINALS, INC.
WIGGIN TERMINALS, INC.,
THE NEW YORK CENTRAL RAILROAD COMPANY

**Attorneys.**

For plaintiffs except Mass. Port Authority
JOHN M. REED
WITHINGTON, CROSS, PARK & MCCANN
73 Tremont St., Boston

---

THOMAS J. HANNON
141 Milk St., Boston
Mass. Port Authority

*v.*

THE BOSTON SHIPPING ASSOCIATION, INC.,
AMERICAN EXPORT LINES, INC.,
AMERICAN PRESIDENT LINES, LTD.,
BOSTON SHIPPING CORP.,
FARRELL LINES, INC.,
FURNESS, WITHY & CO., LTD.,
MOORE-McCORMACK LINES, INC.,
J. F. MORAN CO.,
MORAN SHIPPING AGENCIES, INC.,
NORTON, LILLY & COMPANY, INC.,
C. CAMPBELL PATTERSON, JR. and JOHN I. WYLDE,
d/b/a PATTERSON, WYLDE & COMPANY,
PEABODY & LANE, INC.,
C. H. SPRAGUE & SON CO.,
UNITED STATES LINES COMPANY

**Attorney.**

For defendants
LEO F. GLYNN
50 State St., Boston, Mass.

| **Statistical Record** | **Costs** |
|---|---|
| J. S. 5 mailed | Clerk |
| J. S. 6 mailed | Marshal |
| Basis of Action: Contract—Declaratory Judgment | Docket fee |
| | Witness fees |
| Action arose at: | Depositions |

| **Date** | **Name or Receipt No.** | **Rec.** | **Disb.** |
|---|---|---|---|
| | (Illegible) | | |

C.A. 65-540-W

| **Date** | | **Proceedings** | **Date Order or Judgment Noted** |
|---|---|---|---|
| 1965 | | | |
| Sep | 1 | Defts' Petition for Removal filed. | |
| | 1 | Attested copies of the following pleadings filed in the Suffolk Superior Court filed; Petition for Declaratory Judgment, Appearance of Leo F. Glynn for defendants, Docket Entries. | |
| | 1 | Removal Bond filed, Fidelity and Deposit Co of Maryland, surety $500.00 | |
| | 7 | Defendants' Answer to Petition for Declaratory Judgment filed. c/s | |

9 Pltfs' Notice of Taking Deposition of the deft. The Boston Shipping Assoc Inc by its Mgr. John S. Dennehy on Sept. 17, 1965 at 10 a.m. at 73 Tremont St., Boston, Mass. filed. c/s Subpoena issued.

17 Deft's Notice of Taking Deposition of Sherman L. Whipple on Sept 24, 1965 at 2PM at 50 State St., Boston, Mass. filed. c/s

17 Defts' Notice of Taking Deposition of John F. O'Halloran on Sep 24, 1965 at 3:30PM at 50 State St., Boston, Mass. filed. c/s

Dec 10 Plaintiff's Motion for Pre-Trial Order or, in the Alternative, Summary Judgment filed. c/s Affidavit of Sherman L. Whipple in Support of Motion, and Deposition of John S. Dennehy attached thereto.

30 Pltfs' Brief in Support of Motion for Pre-Trial Order etc filed.

1966

Jan 13 Defendants' Motion for Summary Judgment filed. c/s

24 Defts' Memorandum of Law in Support of its Motion for Summary Judgment filed.

24 Pltfs' Reply Brief filed.

28 WYZANSKI, CH J. Defts' reply memorandum filed;
PRETRIAL BEGINS; parties heard on question of jurisdiction; one week for briefs.

Feb 4 Defts' Memorandum Concerning Jurisdiction of the United States District Court filed. c/s

4 Pltfs' Brief on Jurisdiction filed. c/s

8 WYZANSKI, CH J. Hearing on motion for Pretrial Order; parties stipulate facts and also to prepare order for signature providing for

stay until defendants have opportunity to apply to Federal Maritime Commission. File stipulation soon as possible.

Mar 11 WYZANSKI, CH Jr. Agreed Statement of Facts filed and approved.

11 WYZANSKI, CH Jr. ORDER entered.

"... 1. The Federal Maritime Commission has initial and primary jurisdiction to determine the lawfulness and reasonableness of the practices under Item 11 of Section III of the pltfs' tariff.

2. The within proceeding in this Court is stayed in its present posture to allow the defendants a further opportunity to apply for and obtain from the Commission its determination or rulings as to such lawfulness and reasonableness.

3. The parties shall within 60 days report to the Court upon any action taken pursuant to paragraph 2. The Court may then make an order further staying the within proceeding or such further order as may be appropriate.

4. The Court will retain jurisdiction of the within proceeding. Any question as to whether further proceedings of the cause herein shall be controlled by the Administrative Procedure Act is now reserved."

May 12 Report of Parties pursuant to Court's Order of March 11, 1966, filed.

13 WYZANSKI, CH Jr. Report of Parties noted.

1967

July 27 Amendment to Order filed. Assented to.

Aug 15 WYZANSKI, CH J. Amendment to Order Allowed.

1968

June 14 Plaintiffs' request for admission of facts and genuineness of documents, filed. c/s

June 24 Defendants' answers to plaintiffs notice to admit facts, filed. c/s

July 8 Defendants' request for admission of facts and genuineness of documents, filed. c/s

18 Plaintiffs' Response to Defendants' Request for Admission, filed with c/s.

(Last entry for July 18, 1969)

1969

Apr 15 Motion of Rederiaktiebolaget Transatlantic to intervene as of right under rule 24(a)(2) F.R.C.P. or in the alternative permissively under Rule 24(b)(2) F.R.C.P. filed c/s

16 WYZANSKI, Ch. J. Motion of Rederiaktiebolaget to intervene, allowed. Messrs. Reed, Glynn, Moulton, and Lynch notified.

22 Answer of defendant Intervener Rederiaktiebolaget Transatlantic, filed.

24 Memorandum of Port of Boston Marine Terminal Association for pre-trial conference, filed.

25 WYZANSKI, Ch. J. Stipulation entered into by all parties except Intervener Rederiaktiebolaget filed in open court. Mr. Moulton moves for admission of George J. Galland and Messrs. Galland, Kharasch, Calkins and Lippman for participation in this case; granted. Intervene (sic) informs court that evidence will be offered on its behalf, trial on the merits Monday, April 28, 1969.

28 WYZANSKI, Ch. J. Trial on the merits, jury begins; stipulation of facts by all parties filed in open court; intervener Swedish Transatlantic files two memos,

1) on issues under section 15 of the Shipping Act, and 2) on the status of terminal and carrier tariffs; all evidence concluded; argument reserved.

29 WYZANSKI, Ch. J. Opinion filed. Copy to Messrs. Muldoon, Moulton "... there is no merit to the intervenor's various contentions ... Plaintiff shall prepare an appropriate form for declaratory judgment and order, and serve on all parties by May 5, 1969."

May 2 WYZANSKI, Ch. J. Declaratory judgment and order entered.

"1. That item II of Section III of the plaintiffs' tariff annexed to the petition herein is valid and enforceable, etc. ...

2. defendants listed ... ordered to pay the corresponding plaintiff ..." Copy to Messrs. Muldoon, Stewart, Glynn, Moulton.

21 Deft—Intervenor's notice of appeal filed. Copies to Messrs. Reed, Stewart and Glynn.

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GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Case No. 7368

PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL.,

*v.*

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,

REDERIAKTIEBOLAGET TRANSATLANTIC

| Date | Filings—Proceedings. | Filed |
|---|---|---|
| 1969 | | |
| June 30 | Record on appeal in two volumes filed and case docketed. Appearances of Stephen Moulton and George F. Galland, for the appellant, filed. | |

| | |
|---|---|
| July 15 | Appearance of John M. Reed and Robert J. Muldoon, Jr., for the appellees filed. Statement and designation filed late by leave of court. |
| July 22 | Counter-designation of appellees filed. |
| Aug. 11 | Brief for appellant filed. Appendix to briefs filed. |
| Sept. 10 | Brief for appellee filed. |
| Sept. 16 | Motion, assented to, filed. Order (Aldrich, Ch. J.) enlarging the time for filing reply brief for appellant to and including September 29, 1969. Notices mailed. |
| Sept. 25 | Assigned for hearing at the October, 1969 session. |
| Sept. 29 | Reply brief for appellant filed. |
| Oct. 8 | Heard before Aldrich, Woodbury, and McEntee, JJ. |
| Oct. 9 | Supplemental memorandum *re* jurisdiction filed. |
| 1970 | |
| Jan. 8 | Judgment: The judgment of the District Court is vacated and the case is remanded with directions to enter judgment for the intervening defendant. Costs on appeal in favor of appellant and against Port of Boston Marine Terminal Association et al., appellees. Opinion by Aldrich, Ch.J. Notices mailed. |
| Jan. 16 | Verified bill of costs filed. |
| Jan. 22 | Order (McEntee, J.) staying mandate. Notices mailed. |
| Jan. 26 | Certified copy of appendices and proceedings to Supreme Court. Notices mailed. |
| Mar. 2 | Notice of filing petition for certiorari (2/27/70) filed. [Oct. Term 1969, No. 1251.] |

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: SUPERIOR COURT
EQUITY
No. 84375

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, an association authorized under the Shipping Act, 1916 (46 U.S.C. sec. 801 et seq.) having a usual place of business in the City of Boston, County of Suffolk;

MASSACHUSETTS PORT AUTHORITY, a body corporate and politic formed under St. 1956, c. 756 (as amended) having a usual place of business in said Boston;

THE MYSTIC TERMINAL COMPANY, a business corporation organized under the laws of Massachusetts, having a usual place of business in the City of Cambridge, County of Middlesex;

PORT TERMINALS, INC., a business corporation organized under the laws of Massachusetts having a usual place of business in said Boston;

WIGGIN TERMINALS, INC., a business corporation organized under the laws of Massachusetts having a usual place of business in said Boston; and

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation organized under the laws of Delaware having a usual place of business in said Boston,

*Plaintiffs,*

V

THE BOSTON SHIPPING ASSOCIATION, INC., a membership corporation organized under c. 180 of the General Laws having a usual place of business in said Boston;

AMERICAN EXPORT LINES, INC., a corporation organized under the laws of New York, having a usual place of business in said Boston;

AMERICAN PRESIDENT LINES, LTD., a corporation organized under the laws of Delaware having a usual place of business in said Boston;

BOSTON SHIPPING CORP., a business corporation organized under the laws of Massachusetts having a usual place of business in said Boston;

FARRELL LINES INC., a business corporation organized under the laws of New York, having a usual place of business in Boston;

FURNESS, WITHY & CO. LTD., a corporation organized under the laws of Great Britain and Ireland having a usual place of business in said Boston;

MOORE-McCORMACK LINES, INC., a corporation organized under the laws of Delaware, having a usual place of business in said Boston;

J. F. MORAN CO., a corporation organized under the laws of Rhode Island, having a usual place of business in said Boston;

MORAN SHIPPING AGENCIES, INC., a corporation organized under the laws of Massachusetts, having a usual place of business in said Boston;

NORTON, LILLY & COMPANY, INC., a corporation organized under the laws of New York; having a usual place of business in said Boston;

C. CAMPBELL PATTERSON, JR. and JOHN I. WYLDE, partners, doing business as PATTERSON, WYLDE & COMPANY, a partnership organized under the laws of Massachusetts, having a usual place of business in said Boston;

PEABODY & LANE, INC., a business corporation organized under the laws of Massachusetts, having a usual place of business in said Boston;

C. H. SPRAGUE & SON CO., a corporation organized under the laws of Delaware, having a usual place of business in said Boston; and

UNITED STATES LINES COMPANY, a corporation organized under the laws of New Jersey, having a usual place of business in said Boston,

*Defendants.*

## PETITION FOR DECLARATORY JUDGMENT

1. This is a petition under G.L. c. 231A for a declaration of rights with respect to strike storage provisions in a tariff issued by and in behalf of the plaintiffs and for certain other reliefs.

2. The plaintiff Port of Boston Marine Terminal Association ("PBMTA") is an association existing pursuant to Federal Maritime Commission Agreement No. 8785, having a usual place of business in Boston, Suffolk County. A copy of the agreement is annexed as Exhibit A to this bill and is incorporated by reference. [Exhibit A is reproduced in Appendix, vol. II, at p. 5.] The plaintiffs other than PBMTA constitute the present membership of PBMTA. Their organizations and places of business are as stated above.

3. The defendant Boston Shipping Association, Inc. ("BSA") is a Massachusetts non-profit corporation formed for the purpose of promoting harmonious relations between shipowners, shipping agents, brokers, freight forwarders, and other firms and corporations engaged in the maritime industry in Boston and serving its members in the negotiation and carrying out of labor agreements be-

tween the members and their employees. The defendants other than BSA are members of BSA. Their organizations and places of business are as stated above.

4. The members of PBMTA furnish wharfage, dock and other marine terminal facilities in the Port of Boston in connection with common carriers by water in interstate and foreign commerce.

5. Pursuant to Agreement No. 8785, PBMTA originally issued Terminal Tariff No. 1 on June 15, 1962. The tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785. A copy of the tariff as presently in force is annexed as Exhibit B and is incorporated by reference. [Exhibit B is reproduced in Appendix, vol. II, at p. 11.]

6. A controversy has arisen between the parties concerning the validity and effect of the provisions of the tariff concerning strike storage, namely, item 11 of Section III, appearing at page 20 of Exhibit B. BSA takes the position that the strike storage provisions are not controlling and its members who are steamship owners and agents accordingly refuse to pay strike storage on the terms contained in the tariff. PBMTA and its members, having issued the tariff, including item 11, under Agreement No. 8785, take the position that item 11 is binding on all users of the respective terminals.

7. The Port of Boston was closed down from January 11, 1965 to February 13, 1965 by a longshoremen's strike. The longshoremen were and are employees of the defendants and not of the plaintiffs. During the strike, strike storage charges were accrued against the defendants other than BSA in the amounts shown in Exhibit C attached to this bill and incorporated herein by reference. [Exhibit C is reproduced in Appendix, vol. II, at p. 48.] The amount of the charges is not in controversy, but the respective defendants refuse to pay any part of such charges.

8. The controversy presented by this bill for decision gives rise to uncertainty and confusion among the parties as to their rights and is properly a subject for declaratory relief.

WHEREFORE, the plaintiffs pray:

(1) That, upon due notice, the pleadings be speedily completed;

(2) That the Court enter a declaratory decree adjudging that, under item 11 of Section III of the plaintiffs' tariff, the defendants are obligated to pay strike charges as they accrue;

(3) That the Court order the defendants to pay such amounts to the respective plaintiffs as may be found to be owing for strike storage; and

(4) For such other relief as may be proper.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION,
THE MYSTIC TERMINAL COMPANY,
PORT TERMINALS, INC.
WIGGIN TERMINALS, INC., and
THE NEW YORK CENTRAL RAILROAD COMPANY,
*By their attorney,*
JOHN M. REED

MASSACHUSETTS PORT AUTHORITY,
*By its attorney,*
THOMAS J. HANNON

---

## UNITED STATES DISTRICT COURT
FOR THE
## DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

## PETITION FOR REMOVAL

RESPECTFULLY represents the defendants in the above-entitled action, which is a civil action, in equity, com-

menced in the Superior Court, Suffolk County, Boston, Massachusetts.

That the action is one in which a claim is alleged under the Laws of the United States, within the provisions of Section 1441 (b) of Chapter 89, Title 28, United States Code Annotated, the venue and procedure concerning which is within the original jurisdiction of the District Courts of the United States.

The above-entitled action was instituted in the Suffolk Superior Court, Commonwealth of Massachusetts, and a copy of the Petition for Declaratory Judgment was received by counsel for the defendants on August 19, 1965. A copy of the Petition for Declaratory Judgment is hereto attached and made part hereof. [*Supra,* p. 9.]

And your petitioner offers and files herewith a Bond with a good and sufficient surety for its entry in the District Court of the United States for the District of Massachusetts within thirty (30) days from the date of filing of this petition, and a certified copy of the record in this action, and for the payment of all costs that may be awarded by the said District Court of the United States, if the said District Court of the United States should hold that this action is wrongly removed thereto.

And your petitioner prays, therefore, that said surety and bond may be accepted and that said action may be removed to the District Court of the United States to be held in the District of Massachusetts at Boston pursuant to the Statutes of the United States in such causes made and provided, and that no further proceedings may be had herein in the said Suffolk Superior Court.

By their attorney,
/s/ Leo F. Glynn
Leo F. Glynn
50 State Street
Boston, Massachusetts

Then personally appeared the above-named Leo F. Glynn and made oath that he is attorney for the multiple defendants in the foregoing petition, that he has read the said petition and knows the contents thereof, that the same is true to the best of his knowledge, information and belief, that the said petition is signed by the attorney for the defendants who agrees that it will be given the same weight as if signed by an officer of the defendants individually.

Subscribed and sworn to before this first day of September, 1965.

/s/ JOHN T. RILEY
Notary Public

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS
(Title omitted in printing)

## DEFENDANTS' ANSWER TO PETITION FOR DECLARATORY JUDGMENT

Now come the defendants in the above-entitled action, by their attorney, Leo F. Glynn, and make the following answer to the plaintiffs' Petition for Declaratory Judgment:

*First:* The defendants respectfully submit that the first paragraph of the plaintiffs' petition is a declaration of purpose and as such is not required to be admitted or denied.

*Second:* The defendants are without knowledge concerning the allegations in the second paragraph of the plaintiffs' petition and, therefore, deny the same.

*Third:* The defendants admit the allegations in the third paragraph of the plaintiffs' petition.

*Fourth:* The defendants are without knowledge and, therefore, deny the allegations in the fourth paragraph of

the plaintiffs' petition, except that the defendants admit the use of wharfs of the plaintiff by ocean vessels.

*Fifth:* The defendants deny the allegations in the fifth paragraph of the plaintiffs' petition and specifically that the tariff rates were legally or properly in force.

*Sixth:* The defendants admit that a controversy has arisen between the parties, but denies that it is limited to the allegations cited in paragraph six of the plaintiffs' petition.

*Seventh:* The defendants deny the allegations in the seventh paragraph of the plaintiffs' petition.

*Eighth:* The defendants deny the allegations in the eighth paragraph of the plaintiff's petition, except as to the allegations previously admitted in paragraph sixth herein.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that prior to the dates of the alleged storage, the defendants notified the plaintiffs, in accordance with the telegram annexed hereto [*infra*], of their refusal to accept the terms of the proposed charges and have continued to reaffirm that refusal on numerous other occasions, as will be shown more fully at the time of trial.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that the allegations contained in the petition do not set forth a cause of action within the provisions of the Shipping Act.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that the provisions of the Shipping Act, Title 46 801 *et seq.*, do not provide to the plaintiffs any remedy by operation of law.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that the plaintiffs

have failed to comply with the provisions of the Shipping Act aforesaid.

WHEREFORE, the defendants pray that the petition be dismissed with costs.

By their attorney,
/s/ Leo F. Glynn
50 State Street
Boston, Massachusetts

[Certificate of Service]

---

EXHIBIT

Sherman L. Whipple, Chairman, Port of Boston Marine Terminal Assn.
50 Terminal Street
Boston, Massachusetts 1964 Sept 29 PM 4:26

Reference is made to Paragraph E of Item 4, First Revised Page 18, cancelling original page 18 of a tariff issued by Sherman L. Whipple, Chairman, 50 Terminal Street, Boston, Massachusetts, purportedly to be effective September 30, 1964.

This is to notify the aforesaid Sherman L. Whipple in his capacity as issuing agent that no member of the Boston Shipping Association accepts in any respect whatsoever the terms described in Paragraph E, nor will any member of the Boston Shipping Association agree in any respect to accept the assessment on the vessel with respect to wharf demurrage referred to therein. The members of the Boston Shipping Association herewith expressly refuse to accept or be bound in any respect by the aforesaid clause in any transaction which may occur.

Boston Shipping Association, Inc.
John S. Dennehy, Manager

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

PLAINTIFFS' MOTION FOR PRE-TRIAL ORDER OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

Plaintiffs move that the Court, in its discretion, enter either an order pursuant to Rule 16 for the simplification of issues and other matters which may aid in the disposition of the pending action or, in the alternative, a summary judgment pursuant to Rule 56 upon prayer 2 of the petition in this case. Plaintiffs propose that the terms of such order or judgment be as follows:

"Defendants may proceed before the Federal Maritime Commission by complaint or otherwise to secure review as to the reasonableness of item 11 of Section III of plaintiffs' tariff. Unless defendants have so proceeded and obtained such review prior to the trial of this cause, item 11 of Section III will be considered valid for the purpose of this litigation."

Plaintiffs submit the following documents in support of this motion: an affidavit of Sherman L. Whipple, Chairman of plaintiff Port of Boston Marine Terminal Association; and a deposition of John S. Dennehy, Manager of de-

fendant Boston Shipping Association, Inc., together with accompanying exhibits.

By their attorneys,

/s/ Thomas J. Hannon
THOMAS J. HANNON
*Attorney for* Massachusetts Port Authority

/s/ John M. Reed
JOHN M. REED
Withington, Cross, Park & McCann
*Attorneys for all plaintiffs other than* Massachusetts Port Authority

[Certificate of Service]

---

## AFFIDAVIT OF SHERMAN L. WHIPPLE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRE-TRIAL ORDER OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

The undersigned, Sherman L. Whipple, being duly sworn, deposes and says that:

1. He is chairman of the Port of Boston Marine Terminal Association ("PBMTA") and as such chairman gives this affidavit.

2. PBMTA was formed under an agreement dated February 26, 1962, a copy of which is annexed to this affidavit and marked "A." [Exhibit "A" is reproduced in Appendix, vol. II, at p. 5.] On March 16, 1962 the Federal Maritime Commission published in the Federal Register (at page 2539) a notice that agreement No. 8785 had been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916. The Commission sub-

sequently gave its approval, and copy of the approval is annexed hereto and marked "B."

3. PBMTA has had in force since 1962 a published tariff known as F.M.C. Terminal Tariff No. 1. From time to time pages of the tariff have been revised. When this is done a new page is stapled directly over the old page and the old page is marked cancelled. A copy of the tariff as it was in force during the longshoremen's strike in 1965 is annexed hereto, with the cancelled pages included as cancelled, and marked "C." [Exhibit "C" is reproduced in Appendix, vol. II, at p. 11.]

4. On August 5, 1964, the Superintendent of Marine Terminals of the Massachusetts Port Authority, which is one of the member terminal operators, wrote the undersigned a letter, copy of which is annexed and marked "D." There has been subsequent correspondence between PBMTA and the Boston Shipping Association. Exhibits representing this correspondence are attached to the deposition of John S. Dennehy, manager of the Boston Shipping Association. The undersigned is personally familiar with this correspondence.

5. The Commission has undertaken an investigation of free time and demurrage practices on in-bound cargo in the Port of New York. Copy of the notice of this investigation was published in the Federal Register on May 12, 1965. Both PBMTA and the Massachusetts Port Authority have intervened in that proceeding as parties. Copy of the petition for intervention of PBMTA is annexed hereto as Exhibit "E." [Exhibit "E" is not reproduced in the Appendix.] PBMTA has been allowed to intervene by the Commission.

/s/ Sherman L. Whipple
Sherman L. Whipple

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

On this 9th day of December, 1965 personally appeared before me Sherman L. Whipple, chairman of the Port of Boston Marine Terminal Association, and made oath that the foregoing affidavit, by him subscribed, is true, of his own knowledge.

ELEANOR G. NOONAN
Notary Public

---

EXHIBIT B

FEDERAL MARITIME COMMISSION
WASHINGTON 25, D.C.

In reply refer to:
A17-9-1/8785:40

May 10, 1962

Mr. Sherman L. Whipple
Port of Boston Marine
Terminal Association
50 Terminal Street
Boston 29, Massachusetts

Dear Mr. Whipple:

You are hereby notified that by order of May 7, 1962, the Federal Maritime Commission, pursuant to section 15 of the Shipping Act, 1916, approved Agreement No. 8785, copy of which is enclosed.

Sincerely yours,
/s/ THOMAS LISI
Thomas Lisi
Secretary

EXHIBIT D

MASSACHUSETTS PORT AUTHORITY

Operating: The Mystic River Bridge - Port of Boston Facilities - Boston-Logan International Airport - Hanscom Field

141 MILK STREET - BOSTON - 9
MASSACHUSETTS - TELEPHONE 482-2930

August 5, 1964

Port of Boston Marine Terminal Association
50 Terminal Street
Boston 29, Massachusetts
Att: Sherman L. Whipple, Chairman

Dear Mr. Whipple:

In reply to your request for additional subjects to be discussed at the August 12th meeting of the Port of Boston Marine Terminal Association may I suggest the following.

Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

I am of the opinion we should establish a more compatible understanding with customers of Boston and assess a charge against the vessel. Consignees, in most instances, are desirous of taking custody of their cargo as quickly as possible and we all know the turmoil that exists on the piers if a "strike is imminent". I am not suggesting we waive the charges, as then the Boston terminal operators would possibly look to the Authority for an abatement or adjustment in rent during the period, however if the steamship

company is unable to deliver the merchandise then I believe it is a charge for their account, not for the consignee or shipper.

• • • • •

Very truly yours,
MASSACHUSETTS PORT AUTHORITY
/s/ J. CONNOLLY
J. J. Connolly
Supt. of Terminals

---

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL
vs.
BOSTON SHIPPING ASSOCIATION, INC, ET AL

CIVIL ACTION
No. 65-640-W

ORDER

The Court, upon considering the respective motions filed by the parties and the Statement of Agreed Facts, makes the following order:

1. The Federal Maritime Commission has initial and primary jurisdiction to determine the lawfulness and reasonableness of the practices under Item 11 of Section III of the plaintiffs' tariff.

2. The within proceeding in this Court is stayed in its present posture to allow the defendants a further opportunity to apply for and obtain from the Commission its de-

termination or ruling as to such lawfulness and reasonableness.

3. The parties shall within 60 days report to the Court upon any action taken pursuant to paragraph 2. The Court may then make an order further staying the within proceeding or such further order as may be appropriate.

4. The Court will retain jurisdiction of the within proceeding. Any question as to whether further proceedings of the cause herein should be controlled by the Administrative Procedure Act is now reserved.

/s/ C. E. Wyzanski, Jr., C. J.

Entered: March 11, 1966

---

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

REPORT OF PARTIES

The parties report to the Court that, following the Court's order, the following steps have been taken: The defendants in the within proceeding filed a complaint (Docket 66-28) with the Federal Maritime Commission on or about April 21, 1966 challenging the lawfulness, and reasonableness of the charges in question herein. The plaintiffs herein subsequently filed an answer as respondents. On May 10, 1966 the presiding examiner of the Commission set a pre-hearing on the matter to be held on May 18, 1966.

In the opinion of counsel, no further order is necessary at the present time in this proceeding.

WITHINGTON, CROSS, PARK & GRODEN

/s/ John M. Reed

GLYNN & DEMPSEY

/s/ Leo F. Glynn

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

AMENDMENT TO ORDER

Now come the respondents in the above-entitled action and respectfully request that the Order of Judge C. E. Wyzanski, Jr., entered March 11, 1966, be amended by adding the following paragraph:

"5. All normal rights of appeal from any decision of the Federal Maritime Commission are reserved to the parties under the applicable statutes and decisions."

15 Aug. 67
Allowed
Wyzanski C. J.

By their attorney,
/s/ Leo F. Glynn
Leo F. Glynn
50 State Street
Boston, Massachusetts

July 25, 1967
Assented to:
Withington, Cross, Park & Groden
by Lothrop Withington

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

MOTION OF REDERIAKTIEBOLAGET TRANSATLANTIC TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2), F.R.C.P. OR IN THE ALTERNATIVE PERMISSIVELY UNDER RULE 24(b)(2), F.R.C.P.

Rederiaktiebolaget Transatlantic (hereafter Transatlantic) respectfully moves to intervene in the above-designated action (a) as of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, or (b) in the alternative, permissively under Rule 24(b)(2), Federal Rules of Civil Procedure. In support of this motion, Transatlantic states:

1. Transatlantic is a common carrier by water operating a steamship business in the foreign commerce of the United States. At all times relevant to the issues involved in this case, Transatlantic was represented at the Port of Boston by its agent, Furness, Withy & Co., Ltd.

2. The complaint filed herein names 14 defendants, five of whom (like Transatlantic) are steamship companies; eight of whom, including Furness, Withy, are agents representing one or more steamship companies; and the remaining defendant is a shipping association whose membership comprises both steamship companies and agents of steamship companies. The complaint requests money damages in specified amounts against each steamship company or agent, as set forth in Exhibit C of the complaint.

3. Plaintiff's request for admission of facts and genuineness of documents filed in this Court on June 14, 1968 shows that plaintiff's total claim is in the amount of $33,309.27 ($34,726.93 minus $1,417.68 reported as paid), and this claim is comprised of 15 separately-stated claims

against 12 defendants. The largest amount outstanding is a claim of $9,965.01 against Furness, Withy, of which $1,200.00 has been paid since June 14, 1968.

4. Transatlantic believes that a substantial portion of claims other than the claim against Furness, Withy has been paid, leaving the claim against Furness, Withy of $8,765.01 the largest single claim. Transatlantic is unable to determine which claims have been paid and which are outstanding because defendants' counsel has been unable thus far to supply that information.

5. If judgment is entered against Furness, Withy, Transatlantic will be liable to reimburse Furness, Withy as its agent in the amount of $8,154.85.

6. Following the filing of plaintiffs' complaint and defendant's answer thereto, both plaintiffs and defendants moved for summary judgment. This Court, on March 11, 1966, stayed the proceeding, retaining jurisdiction thereof, in order to allow the defendants to obtain rulings from the Federal Maritime Commission as to issues which this Court held were within the initial and primary jurisdiction of that Commission. The present defendants made application to the Commission, which rendered a ruling adverse to the defendants on June 28, 1967. No petition to review the Commission's ruling was seasonably filed with any Court of Appeals.

7. On September 4, 1968, Transatlantic, which at all times prior thereto had been represented by counsel for Furness, Withy, petitioned the Federal Maritime Commission in its own name and by its own counsel to reconsider its ruling on the basis of a decision by the Supreme Court of the United States rendered after the Commission's ruling. Transatlantic urged before the Commission that the Supreme Court holding rendered erroneous the aforesaid Commission ruling which this Court had allowed the defendants to procure. The Commission refused to accept

for filing the Transatlantic petition on the ground that the Commission's rules absolutely prohibit the filing of any petitions for reconsideration more than 30 days after the date of a Commission action.

8. Transatlantic has an interest relating to the property which is the subject of this action because it will be obliged to indemnify Furness, Withy as its agent for Transatlantic's pro rata share of any judgment against Furness, Withy. Transatlantic is so situated that a judgment against Furness, Withy will impede Transatlantic's ability to protect its own interest because such judgment against Furness, Withy will be binding on Transatlantic, and Transatlantic will thereafter be unable to contest the plaintiffs' claims even though Transatlantic is advised and believes that it has a meritorious defense.

9. Transatlantic's interest is not adequately represented by existing parties because—

(a) Furness, Withy is the only party having any measure of responsibility for Transatlantic's interest;

(b) Such responsibility is slight because:

(1) Furness, Withy is agent for four other principals in addition to Transatlantic. Three of such principals have already paid the claim against them. Such payments amount to $1,200. Of the remaining $8,765.01 assertedly due from Furness, Withy, $8,154.85 is owed by Transatlantic;

(2) The liability for Transatlantic's pro rata share of plaintiffs' demands falls ultimately on Transatlantic and not at all on Furness, Withy, which consequently lacks substantial incentive to contest such demands.

(c) No other defendant, and no other principal of Furness, Withy is subject to a claim more than fractionally as large as that against Transatlantic.

(d) Neither Furness, Withy nor any other defendant perfected an appeal to any court of competent jurisdiction from the ruling of the FMC or tendered in this court the issues which Transatlantic now seeks to raise.

10. Accordingly, Transatlantic moves to intervene as of right under Rule 24(a)(2). In the alternative, Transatlantic moves to intervene permissively under Rule 24(b)(2) on the ground that its defense to the complaint involves questions of law and fact which are common to the main action in this case and that its intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

/s/ STEPHEN MOULTON

STEPHEN MOULTON
Moulton, Looney, Mazzone & Falk
15 Broad Street
Boston, Massachusetts 02109
*Attorney for*
Rederiaktiebolaget Transatlantic

*Of Counsel:*
Galland, Kharasch,
Calkins & Lippman
1824 R Street, N.W.
Washington, D.C. 20009

April 8, 1969
[Certificate of Service]

Allowed
Wyzanski, C. J.
16 April '69

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

## ANSWER OF DEFENDANT-INTERVENER REDERIAKTIEBOLAGET TRANSATLANTIC

Defendant-Intervener Rederiaktiebolaget Transatlantic (hereafter, Transatlantic), answering the Petition for Declaratory Judgment:

1. Admits paragraph 1 except denies that the document therein described as a tariff in fact constituted a tariff or had any force or effect as such.

2. Admits paragraph 2.

3. States that it has no information sufficient to form a belief as to paragraph 3.

4. Admits paragraph 4 but denies that the members of PBMTA are legally authorized to perform terminal services except as permitted under Article THIRD of Federal Maritime Commission Agreement 8785.

5. Admits paragraph 5 except denies that the document therein described as a tariff in fact constituted a tariff or had any force or effect as such.

6. Admits the first sentence of paragraph 6 except denies that the document therein described as a tariff in fact constituted a tariff or had any force or effect as such; states that it lacks information sufficient to admit or deny the remaining allegations of the paragraph; and alleges that the purported tariff was not binding on Transatlantic.

7. Admits the first sentence of paragraph 7; denies that the striking longshoremen were employees of Transatlantic; states that it lacks information sufficient to admit or deny the remaining allegations of the paragraph except that—(a) it admits that $8,154.85 of the sum claimed by Mystic Terminal Co. against Furness, Withy & Co. is claimed with respect to cargo discharged from one of Transatlantic's vessels for which Furness, Withy acted as agent; and (b) denies that Transatlantic is liable for the charges claimed or any part thereof.

8. Denies paragraph 8.

*For a first affirmative defense, states:*

9. That Federal Maritime Commission Agreement 8785 does not authorize plaintiffs to adopt charges for strike storage, or to assess strike storage or any other wharfage charges against vessels or their owners; consequently plaintiffs' agreement to assess such charges, as set forth in their purported tariff, is unlawful under Section 15 of the Shipping Act (46 U.S.C. § 814) because not approved by the Federal Maritime Commission.

10. A ruling of the Federal Maritime Commission of June 28, 1967 in Docket 66-28 was:

(a) wrong when issued because it misinterpreted Section 15 of the Shipping Act, 46 U.S.C. § 814;

(b) advisory only, and not binding on this Court;

(c) in direct conflict with the decision of the Supreme Court of the United States issued on March 6, 1968 in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261.

*For a second affirmative defense, states:*

11. The purported tariff (Exhibit B to the complaint) on which rests plaintiffs' claim was not in fact a tariff because not filed pursuant to any statute or regulation (a) requiring that tariffs be filed by terminal operators, or (b) providing that such "tariffs" were binding upon users of terminal services. Plaintiffs' purported tariffs were merely reports to the Federal Maritime Commission pursuant to commitments made by the parties to Agreement 8785.

*For a third affirmative defense, states:*

12. The cargo discharged by Transatlantic at Mystic Terminal was transported under the terms of a tariff filed with the Maritime Commission pursuant to Section 18 (b) (1) of the Shipping Act (46 U.S.C. § 817(b)(1)) and hav-

ing the force of law pursuant to Section 18(b)(3) of th
Shipping Act (46 U.S.C. § 817(b)(3)). That tariff pr
vided that Transatlantic's responsibility terminated upo
discharge of the cargo at the end of ship's tackle. An
payment for service to cargo beyond ship's tackle woul
violate its tariff and consequently Sections 18(b)(3) of th
Shipping Act and also Section 16, Second of the Shippin
Act, 46 U.S.C. § 815.

WHEREFORE, Defendant-Intervener Transatlantic de
mands judgment—

(a) dismissing the complaint as against Tran
atlantic and with respect to all claims pertaining t
cargo discharged by Transatlantic; or, alternatively

(b) determining that neither Transatlantic no
Furness, Withy as its agent is liable for the strike sto
age charges demanded in the complaint, or for an
part of such charges.

/s/ STEPHEN MOULTON
STEPHEN MOULTON
Moulton, Looney, Mazzone & Falk
15 Broad Street
Boston, Massachusetts 02109
*Attorney for*
Rederiaktiebolaget Transatlantic

*Of Counsel:*
Galland, Kharasch,
Calkins & Lippman
824 R Street, N.W.
Washington, D.C. 20009

[Certificate of Service]

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

## STIPULATION OF FACTS

Plaintiffs and defendants stipulate that the following are the material facts:

1. The facts stated in the report of the Federal Maritime Commission under the heading "FACTS" may be taken as true. 10 F.M.C. 409 at 410-413. The facts stated in the report of Examiner Theeman through page 9, middle of the page, may also be taken as true to the extent not inconsistent with the Commission's report. (The parties are unaware of any inconsistency.) Copies of the opinion of the Federal Maritime Commission and the decision of the Examiner are attached hereto as Exhibits "A" and "B". [Exhibit "A" is reproduced in Appendix, vol. II, at p. 48; Exhibit "B" is not reproduced.]

2. The plaintiff, Port of Boston Marine Terminal Association (PBMTA) is an association existing pursuant to Federal Maritime Agreement No. 8785, and has a usual place of business in Boston, Massachusetts. A copy of Agreement No. 8785 is attached hereto as Exhibit "C". [Exhibit "C" is reproduced in Appendix, vol. II, at p. 5.] The plaintiffs other than PBMTA are the present membership of PBMTA. Their organizations and places of business are as stated in the plaintiffs' petition.

3. The defendants are the Boston Shipping Association (BSA), a Massachusetts non-profit corporation, and several members of BSA, whose organizations and places of business are as stated in the plaintiffs' petition.

4. The members of PBMTA furnish wharfage, dock and other marine terminal facilities in the Port of Boston in

connection with common carriers by water in interstate and foreign commerce.

5. Pursuant to Agreement No. 8785, PBMTA issued Terminal Tariff No. 1, on June 15, 1962. The tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785. A copy of the tariff is on file with the court with the affidavit of Sherman L. Whipple.

6. On or about April 21, 1966, after this case had commenced, the defendants filed a complaint with the Federal Maritime Commission challenging the lawfulness and reasonableness of Item 11 of the Tariff.

7. On or about September 19, 1967, defendants filed a petition for review of the Commission's order of June 28, 1967, in the United States Court of Appeals for the District of Columbia Circuit.

8. By a judgment dated March 18, 1968, the Court of Appeals dismissed the petition. A copy of the judgment is attached hereto as Exhibit "D." [Exhibit "D" is reproduced in Appendix, vol. II, at p. 66.]

9. By an order dated April 25, 1968, the Court of Appeals denied defendants' application for rehearing. A copy of that order is annexed as Exhibit "E." [Exhibit "E" is reproduced in Appendix, vol. II, at p. 67.]

10. On September 4, 1968, Swedish Transatlantic Line presented a petition to the Federal Maritime Commission for reconsideration of its decision in this matter. A copy of the Petition for Reconsideration is annexed hereto as Exhibit "F." [Exhibit "F" is reproduced in Appendix, vol. II, at p. 68.]

11. On October 8, 1968, the Federal Maritime Commission returned the Petition for Reconsideration to the attorneys for Swedish Transatlantic Line on the grounds that

it was time barred. A copy of the letter returning the petition is attached hereto as Exhibit "G." [Exhibit "G" is reproduced in Appendix, vol. II, at p. 77.]

12. The current balances of strike storage charges are not in controversy. Those current balances are shown in Exhibit "H" attached hereto.

By their attorneys,

WITHINGTON, CROSS, PARK & GRODEN

By: /s/ JOHN M. REED
/s/ ROBERT J. MULDOON, JR.
*Counsel for all petitioners except*
Massachusetts Port Authority
/s/ NEIL L. LYNCH
*Counsel for petitioner*
Massachusetts Port Authority

GLYNN & DEMPSEY

By: /s/ LEO F. GLYNN
*Counsel for defendants*

## UNITED STATES DISTRICT COURT

FOR THE

## DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

Plaintiffs, defendants and defendant-intervener stipulate that the following are the material facts:

1. The plaintiff Port of Boston Marine Terminal Association (PBMTA) is an association existing pursuant to Federal Maritime Agreement No. 8785, and has a usual place of business in Boston, Massachusetts. A copy of Agreement No. 8785 is attached hereto as Exhibit I. [Exhibit I is reproduced in Appendix, vol. II, at p. 5.] The plaintiffs other than PBMTA are the present membership of PBMTA. Their organizations and places of business are as stated in the plaintiffs' petition.

2. The defendants are the Boston Shipping Association (BSA), a Massachusetts non-profit corporation, and sev-

eral members of BSA whose organizations and places of business are as stated in the plaintiffs' petition. The defendant-intervener, Transatlantic, is not a member of BSA. It is a Swedish corporation whose headquarters is in Gothenburg.

3. The members of PBMTA furnish wharfage, dock and other marine terminal facilities in the Port of Boston in connection with common carriers by water in interstate and foreign commerce.

4. Pursuant to Agreement No. 8785, PBMTA issued Terminal Tariff No. 1, on June 15, 1962. The tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785. A copy of the tariff is on file with the court with the affidavit of Sherman L. Whipple.

5. On or about April 21, 1966, after this case had commenced, the defendants filed a complaint with the Federal Maritime Commission (Docket 66-28) challenging the lawfulness and reasonableness of Item 11 of the Tariff. This case was stayed by this court pending action by the Commission—this court retaining jurisdiction. A copy of the Commission's report in Docket 66-28 is annexed hereto as Exhibit J. [Exhibit J is reproduced in Appendix, vol. II, at p. 48.]

6. On or about September 19, 1967, defendants filed a petition for review of the Commission's order of June 28, 1967, in the United States Court of Appeals for the District of Columbia Circuit.

7. By a judgment dated March 18, 1968, the Court of Appeals dismissed the petition. A copy of the judgment is attached hereto as Exhibit K. [Exhibit K is reproduced in Appendix, vol. II, at p. 66.]

8. By an order dated April 25, 1968, the Court of Appeals denied defendants' application for rehearing. A copy of that order is annexed as Exhibit L. [Exhibit L is reproduced in Appendix, vol. II, at p. 67.]

9. On September 4, 1968, Swedish Transatlantic Line presented a petition to the Federal Maritime Commission for reconsideration of its decision in Docket 66-28. A copy of the Petition for Reconsideration is annexed hereto as Exhibit M. [Exhibit M is reproduced in Appendix, vol. II, at p. 68.]

10. On October 8, 1968, the Federal Maritime Commission returned the Petition for Reconsideration to the attorneys for Swedish Transatlantic Line on the grounds set forth in the letter annexed hereto as Exhibit N. [Exhibit N is reproduced in Appendix, vol. II, at p. 77.]

11. The current balances of strike storage charges are not in controversy. Those current balances are shown in Exhibit O attached hereto. [Exhibit O is reproduced in Appendix, vol. II, at p. 77.] Of the sum claimed against Furness, Withy & Co., by Mystic Terminal, $8154.85 is allegedly for account of the intervener, Swedish Transatlantic Line.

12. The charges claimed by Mystic Terminal against Furness, Withy involving Transatlantic arose with respect to cargo discharged at Mystic Terminal on January 8-10, 1965 from Transatlantic's vessel, MATTAWUNGA, which departed the terminal on the latter date.

13. A strike of longshoremen and tally clerks and other clerks closed the port of Boston on January 11, 1965 and continued for 33 days. While the strike continued, truck drivers and railroad workers needed to pick up cargo declined to do so and striking clerks were unavailable to make delivery, thus preventing removal of cargo from all Boston piers.

14. Free time on all cargo here involved was five days, under plaintiffs' terminal tariff. On cargo from the MATTAWUNGA, it began on January 10, 1965.

15. The steamship tariffs applicable to the cargo carried by the MATTAWUNGA and discharged at Mystic Terminal were:

(a) Bill of Lading Tariff No. 1 of Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; and

(b) Tariff No. 4 of the same Conference. Exhibit P [Relevant portions of Exhibit P are reproduced in Appendix, vol. II, at p. 78] hereto annexed is the applicable Transatlantic bill of lading from the tariff designated (a) above, and Exhibit Q [Relevant portions of Exhibit Q are reproduced in Appendix, vol. II, at p. 79] is a copy of 1st Revised Page 1 and Original Page 3 of the tariff designated (b) above. Both tariffs were filed with the Federal Maritime Commission pursuant to Section 18(b) of the Shipping Act, 1916. The Transatlantic bill of lading was in evidence, along with others in Docket 66-28.

16. The striking longshoremen (paragraph 13, above) were employees of various stevedoring companies with whom the ocean carriers involved had contracts for the loading and unloading of freight vessels in the port of Boston. A copy of the contract between Transatlantic and Bay State Stevedoring Co. is annexed as Exhibit R. [Ex-

hibit R is not reproduced.] The tally clerks on strike at Mystic Terminal were employees of Bay State Stevedoring Co.

WITHINGTON, CROSS, PARK & GRODEN
By /s/ JOHN M. REED
/s/ ROBERT J. MULDOON, JR.
Counsel for all petitioners except Massachusetts Port Authority
/s/ NEIL L. LYNCH
Counsel for petitioner Massachusetts Port Authority

GLYNN & DEMPSEY
By /s/ LEO F. GLYNN
Counsel for defendants
By /s/ STEPHEN MOULTON
STEPHEN MOULTON
Counsel for intervener Rederiaktiebolaget Transatlantic

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL.,
PLAINTIFFS

v.

Civil Action
No. 65-640-W

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS

REDERIAKTIEBOLAGET TRANSATLANTIC,
DEFENDANT-INTERVENER

OPINION

April 29, 1969

WYZANSKI, Chief Judge

This action was originally brought in the Superior Court of the Commonwealth of Massachusetts for declaratory relief and an order for payment, both referring to a provision in plaintiffs' tariff providing storage charges for cargo located in Boston during longshoremen's strike.

Pursuant to 28 U.S.C. Sec. 1441 b, defendants petitioned for removal of the action to this Court on the ground that the "claim" sued upon is one "arising under the . . . laws of the United States."

The complaint, called a petition under state practice, alleges that Port of Boston Marine Terminal Association (PBMTA) is an association existing under Federal Maritime Commission Agreement No. 8785, that the members furnish wharfage, dock, and other terminal facilities in connection with common carriers by water, and that the applicable tariff is filed with the Maritime Commission. The tariff is said to have been adopted under Section 15 of the Shipping Act, 1916. Relief sought was (1) a declaration that under item 15 of Section III of the tariff, Boston Shipping Association and other defendants are obliged to pay strike charges as they accrue, and (2) an order for payment of charges already accrued during a 1965 dock strike.

At an early stage this Court held that the case is one within this Court's jurisdiction under 28 U.S.C. Sec. 1441 b. See *Wells Fargo & Co. v. Cuneo,* 241 Fed. 726 (S.D.N.Y.); *McGoon v. Northern Pacific Ry. Co.,* 204 Fed. 998 (D.N.D.); Hart & Wechsler, *The Federal Courts and the Federal System,* pp. 727-733, 744-747, 749-752, 763-769, 774-777. Plaintiffs' claim, in this Court's view, involves the construction of the Shipping Act and the result depends on the determination of a controversy as to its scope. Cf. *Shulthis v. McDougal,* 225 U.S. 561, 569. The claim

arises under Agreement No. 8785, which was approved by a federal government agency, the Federal Maritime Commission, and requires consideration of that Commission's rulings. The claim involves, potentially at least, the primary jurisdiction of the Commission. Thus the right of the complainants will be sustained if the laws of the United States and the rules and actions of a federal agency are given one construction and will be defeated if they are given another. See *Bell v. Hood,* 327 U.S. 678.

Having determined it had jurisdiction of this case, this Court on March 11, 1966 entered an order that the Federal Maritime Commission had primary jurisdiction to determine the lawfulness and reasonableness of the contested practice under item 11 of Section III; and that proceedings in this Court should be stayed pending administrative action.

April 21, 1966 defendant presented to the Federal Maritime Commission a challenge to the lawfulness and reasonableness of the questioned charges. After hearing by an examiner, the Commission issued its final report and order under the title *Boston Shipping Association Inc. v. Port of Boston,* 10 F.M.C. 409 (1967). Therein the F.M.C. held that assessment of strike storage charges for cargo on the Boston piers during longshoremen's strikes is subject to the Commission's jurisdiction under Section 17 of the Shipping Act, 1916; that a change in the tariff, shifting the charge from the cargo interests to the vessel did not require prior approval by the Commission under Section 15 of the Act; and that the assessment of the charge against the vessel for cargo which was still in free time (that is, five days following discharge from the vessel) at the commencement of the strike does not constitute an unjust and unreasonable practice under Section 17 of the Act or an undue or unreasonable prejudice under Section 16 of the Act.

No timely appeal was taken from the Commission's order to the Court of Appeals for the District of Columbia.

Swedish Transatlantic Line, which has intervened in this court, on September 4, 1968 filed with the F.M.C. a petition for reconsideration. The F.M.C. dismissed. Swedish Transatlantic sought no review in the District of Columbia.

Thereafter, in this court plaintiffs and defendants entered into one stipulation, and plaintiffs, defendants, and the intervenor entered into another. This Court approved both stipulations. No one wished to offer additional evidence.

On the basis of the stipulations, and in the light of what has been recited, this Court summarily concludes as follows.

The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.

Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

There is no merit to the intervenor's various contentions. It will suffice to deal with one, in addition to those already answered. The F.M.C.'s report cannot be regarded as merely advisory. It was a definite decision. And it was a correct one. There is nothing to be gained by this

Court traversing once more the ground so satisfactorily covered by the Commission itself, and open to inspection by anyone who cares to read the publications of the Commission.

Plaintiffs shall prepare an appropriate form for declaratory judgment and order, and shall serve on all parties by May 5, 1969.

/s/ Charles E. Wyzanski, Jr.
Chief Judge

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC. ET AL.,
PLAINTIFFS

v.

Civil Action
No. 65-640-W

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS

REDERIAKTIEBOLAGET TRANSATLANTIC
DEFENDANT-INTERVENER

[Filed

DECLARATORY JUDGMENT AND ORDER

This action came on for hearing before the Court, and the issues having been heard upon stipulation and a decision of the Court having been rendered on April 29, 1969.

It is ORDERED And ADJUDGED

1. That item 11 of Section III of the plaintiffs' tariff annexed to the petition herein is valid and enforceable ex-

cept to the extent that it assesses strike storage against vessels for cargo on which free time has expired when the strike begins.

2. Each of the defendants listed below is ordered to pay the corresponding plaintiff the principal sum shown plus the interest indicated:

| Defendant | Plaintiff | Principal Amount | Interest from date of filing Petition | Total |
|---|---|---|---|---|
| J. F. Moran Co. | Port Terminals, Inc. | $1158.63 | $256.94 | $1415.57 |
| United States Lines | New York Central System | 2985.20 | 661.94 | 3647.14 |
| Furness, Withy & Co. | Mystic Terminal Co. | 8765.20 | 1943.67 | 10708.87 |
| Moran Shipping Agencies, Inc. | Mystic Terminal Co. | 860.89 | 190.89 | 1051.78 |
| American Export Lines, Inc. | Mystic Terminal Co. | 404.23 | 89.63 | 493.86 |
| Boston Shipping Corp. | Mystic Terminal Co. | 328.28 | 72.80 | 401.08 |

C. E. WYZANSKI, JR.

Entered: May 2, 1969
[Filed

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

[Filed

NOTICE OF APPEAL

Notice is hereby given that Rederiaktiebolaget Transatlantic, Defendant-Intervener above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on the 2nd day of May, 1969.

REDERIAKTIEBOLAGET TRANSATLANTIC
By its attorney
/s/ STEPHEN MOULTON
Stephen Moulton
MOULTON, LOONEY, MAZZONE, FALK
& MARKHAM
15 Broad Street
Boston, Massachusetts 02109

# United States Court of Appeals for the First Circuit.

No. 7368.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,
PLAINTIFFS, APPELLEES,
*v.*
BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS,
REDERIAKTIEBOLAGET TRANSATLANTIC,
DEFENDANT-INTERVENOR, APPELLANT.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*,
and MCENTEE, *Circuit Judge*.

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January 8, 1970.

ALDRICH, *Chief Judge*. The members of the Port of Boston Marine Terminal Association (Terminals), operate pursuant to Federal Maritime Commission Agreement No. 8785, a conference arrangement approved by the Commission under section 15 of the Shipping Act. 46 U.S.C. § 814. Approval permits uniform rates for all "services,

* By designation.

facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water electricity." The tariffs so established were first filed with the Commission in 1962. Wharf demurrage was therein defined as a storage charge "levied against cargo remaining on a pier or wharf after the expiration of free time." On imported cargo "free time" was the first five days after unloading, an arbitrary period to permit consignees sufficient access to the cargo to satisfy the carrier's obligation to make delivery. If delivery was not taken within the free time, the charge, by accruing against the cargo, became the consignee's obligation.

If access to cargo was prevented by a strike, the demurrage rate was substantially reduced, but it remained as a charge against unloaded cargo. This led to complaints by consignees. By December 1964, through a series of amendments, Terminals changed the tariff to provide that if the consignee's access was prevented by a strike of longshoremen or other agents of the ship, as distinguished from employees of Terminals, the reduced demurrage would be called "strike storage" and charged to the vessel instead of to the cargo. This charge was expressed in broad terms, and resulted in shifting the obligation to the vessel even if the strike did not commence until after the expiration of the free time. The new tariff purported to be immediately effective, and hence was imposed without approval by the Commission.

Appellant Rederiaktiebolaget Transatlantic (Swedish) is a common carrier serving the Port of Boston. On January 8, 9, and 10, 1965, its vessel MATTAWUNGA unloaded cargo in Boston at Mystic Terminals. On January 11 there was a general longshoremen's strike. Longshoremen are employees of the stevedoring concerns which serve all vessels. Tally clerks, who are also agents of the vessel, correspondingly struck. Accordingly there could be no

completed delivery of cargo to consignees who had not called before January 11. Non-delivery was additionally assured because transportation employees serving consignees observe picket lines. Under the 1964 amendments Terminals charged the resultant demurrage to the various vessels. MATTAWUNGA'S bill was $8,154. Swedish denied the obligation. Other carriers similarly situated took the same position.

Thereafter Terminals brought an action in the Massachusetts Superior Court for declaratory relief and for payment against Boston Shipping Association (Shipping), representing various vessel owners and agents. Shipping removed the case to the district court. At the suggestion of Terminals the district court ruled that the Commission had primary jurisdiction and entered a stay permitting Shipping to proceed there. Shipping did so, and lost. *Boston Shipping Ass'n, Inc.* v. *Port of Boston Marine Terminal Ass'n*, 1967, 10 F.M.C. 409, hereinafter *Boston Shipping*. It then appealed to the D.C. Court of Appeals, but the appeal was dismissed for late filing. Subsequently Swedish, which was not a member of Shipping, sought to appear before the Commission and to petition for reconsideration.[1] The petition was refused docketing because of lateness. Swedish then sought to intervene as a defendant in the district court proceedings, and that motion was allowed. Upon intervening, Swedish filed an answer raising defenses on the merits. On stipulations of fact the court, without jury, found against all defendants, including Swedish. Swedish, only, appeals.

The first question must concern the jurisdiction of the district court. There is no diversity jurisdiction as to

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[1] Swedish asserted a conflict with *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 1968, 390 U.S. 261, hereinafter *VW*, a case which postdated the *Boston Shipping* decision.

Swedish, for lack of the jurisdictional amount, 28 U.S.C. § 1332. We see no basis for aggregation of the claims against the several defendants. *Cf. Snyder* v. *Harris*, 1969, 394 U.S. 332; *Pinel* v. *Pinel*, 1916, 240 U.S. 594, 596; *Troy Bank* v. *G. A. Whitehead & Co.*, 1911, 222 U.S. 39, 40-41. If this were a suit under a tariff, jurisdiction would automatically attach under 28 U.S.C. § 1337, where the amount involved is of no consequence. *Peyton* v. *Railway Express Agency, Inc.*, 1942, 316 U.S. 350; *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 1926, 271 U.S. 259, 261. Terminals' tariff was not, however, a tariff in the sense of being within 46 U.S.C. § 817, and was filed with the Commission only as a condition imposed by the prior approval of the conference agreement.[2] We nevertheless find a sufficient federal issue. While it is commonly held that the question must appear on the face of the complaint, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 1950, 339 U.S. 667; *Louisville & Nashville R.R.* v. *Mottley*, 1908, 211 U.S. 149, the necessity for construing a federal statute may appear by inference. *Cf. Peyton* v. *Railway Express Agency, Inc., supra.* It is true that the complaint did not allege that the change in the agreement had not been approved by the Commission, but neither did it allege approval. Hence we conclude, albeit with some hesitation, that the necessity of approval was raised, and that it sufficiently appeared that a question of construction of the Shipping Act was presented. This is enough to satisfy section 1337.

We turn to this question forthwith, as it constitutes Swedish's most significant defense. Section 15 requires that "modifications," as well as the original agreement,

[2] General filing requirements for marine terminal tariffs were added by the Commission's General Order 15, 46 C.F.R. §§ 533.1 *et seq.*, which became effective on October 5, 1965, and hence does not apply here.

receive the prior approval of the Commission. In *Boston Shipping* the Commission, without any discussion of the broad language of the act, held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring section 15 filing and approval. In the light of the strictures expressed in *VW, supra*, n. 1, this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in *VW* pointed to the "expansive language" of section 15,[8] and the Commission's "extremely narrow view," and specifically rejected the binding effect of the Commission's administrative construction. 390 U.S. 261, 272-73. Then, referring to the statute's "literal provisions," the Court spoke of possible exceptions only in terms of a "*de minimis* or routine character," and stated that even these must be defined by "appropriate administrative proceedings." 390 U.S. 261, 276.

Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found "*de minimis* or routine." Administrative standards cannot be established ex post facto. *Cf. NLRB* v. *Wyman-Gordon Co.*, 1969, 394 U.S. 759; 5 U.S.C. § 553.

---

[8] The statute requires the filing of "every agreement . . . or modification . . . thereof . . . fixing or regulating transportation rates or fares . . . ." It then provides that the Commission shall approve or disapprove, upon terms stated, and that "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, cancellation . . . ." *See also* n. 4, *infra*.

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We may add, for good measure, that a change in incidence, as distinguished from a change in rate,[4] seems to us anything but routine. Even less routine is an unjustifiable change. The Commission expressly found this one "unjust and unreasonable" to the extent that demurrage was to be charged to the vessel even if the strike did not commence until after the expiration of free time, when the vessel's obligation to make the goods available had been fully performed. 10 F.M.C. at 417-18. It would peculiarly violate section 15's "expansive language" to hold that an unreasonable modification could be rewritten nunc pro tunc and saved in part.[5]

We need consider only one other matter, the question of the binding effect of the *Boston Shipping* decision even though erroneous. We are not concerned with the parties to the proceeding, as they did not join in the present appeal. Nor is the question whether the decision was an appropriate approval—to the extent that it was an approval—of demurrage charges incurred after its date. We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. *See Columbia Broadcasting System, Inc.* v. *United States*, 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise § 18.05. Any other conclusion would destroy the statutory requirement.

*Reversed; judgment for the intervening defendant.*

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[4] The Commission's prior view, that all rate changes under such an agreement are without section 15, *Empire State Highway Transp. Ass'n, Inc.* v. *American Export Lines, Inc.*, 1959, 5 F.M.B. 565, *affirmed, Empire State Highway Transp. Ass'n, Inc.* v. *Federal Maritime Board*, D.C. Cir., 1961, 291 F.2d 336, *cert. denied* 368 U.S. 931, fell with the overruling of the Commission in *VW, supra*. Some changes in rates and charges are now expressly allowable without approval under the 1961 amendment of section 15. This portion is quoted in *VW, supra*, 390 U.S. at 269-70, n. 16. The Commission did not rely upon that provision, nor do appellees herein.

[5] *See* n. 3, *supra*.

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# United States Court of Appeals for the First Circuit.

---

No. 7368.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,
PLAINTIFFS, APPELLEES,

*v.*

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS.

---

REDERIAKTIEBOLAGET TRANSATLANTIC,
DEFENDANT-INTERVENOR, APPELLANT.

## JUDGMENT

Entered January 8, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded with directions to enter judgment for the intervening defendant. Costs on appeal in favor of appellant and against Port of Boston Marine Terminal Association et al., appellees.

By the Court:
ROGER A. STINCHFIELD
*Clerk.*

By /s/ Dana H. Gallup
Chief Deputy Clerk.

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

April 21, 1970

John M. Reed, Esq.
Withington, Cross, Park & Groden
73 Tremont Street
Boston, Massachusetts 02108

RE: PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL. v. REDERIAKTIEBOLAGET TRANSATLANTIC, No. 1251, October Term, 1969

Dear Mr. Reed:

Confirming our telegram of yesterday the Court took the following action in the above-entitled case:

"The petition for a writ of certiorari is granted and the case is placed on the summary calendar."

I enclose a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,
JOHN F. DAVIS, Clerk
By Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Enclosures

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# Supreme Court of the United States

*No.* 1251 ---- , *October Term, 19* 69

Port of Boston Marine Terminal
Association, et al.,

Petitioners,

v.

Rederiaktiebolaget Transatlantic

ORDER ALLOWING CERTIORARI. Filed April 20 ------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First ---------- . Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 1251

---

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL., PETITIONERS

*vs.*

REDERIAKTIEBOLAGET TRANSATLANTIC

---

VOLUME II (EXHIBITS)

**Petition for Certiorari Filed February 27, 1970**
**Certiorari Granted April 20, 1970**

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1. *Federal Maritime Commission*
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FEDERAL MARITIME COMMISSION
Agreement No. 8785

Port of Boston Marine Terminal Association

This is an agreement entered into at Boston, Massachusetts, on February 26, 1962, under Section 15 of Shipping Act of 1916 (as amended) by and among the Marine Terminal Operators of the Port of Boston, Massachusetts relative to rates of and charges by the parties for furnishing wharfage, dock, and other terminal facilities in the Port of Boston in connection with common carriers by water as defined in the Shipping Act, 1916 (46 U.S.C. sec. 801 *et seq.*). Upon becoming effective, this agreement supersedes the previous memorandum of cooperative working arrangement by and among the parties (FMB No. 8365).

The parties have associated themselves into an association known as Port of Boston Marine Terminal Association (hereinafter called the "Association") and severally agree as follows:

*FIRST:*

Each party represents that it is an owner or operator of a marine terminal at Boston, Massachusetts, and as such, furnishes wharfage, dock, or other terminal facilities in connection with common carriers by water at the Port of Boston.

Each party also represents that if it ceases to be an owner or operator of a marine terminal at Boston, Massachusetts, it shall forthwith cease to be a party to this agreement but shall remain liable for any dues or assessments outstanding against it. Prompt notice of such change in status shall be given to the Association, which shall promptly notify the Governmental Agency charged with the administration of the Shipping Act of 1916, as amended, (hereinafter referred to as the "Agency").

*SECOND:*

This agreement and any amendments or modifications thereof are subject to the approval of the Agency in accordance with the provisions of Section 15 of the Shipping Act, 1916, (as amended), and shall not become effective until approved by the Agency. Upon such approval this agreement shall supersede the memorandum of cooperative working arrangements hereinabove referred to.

*THIRD:*

This agreement shall cover the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity.

*FOURTH:*

The parties hereto shall elect from their membership by a majority vote of the entire membership a Chairman, a Vice-Chairman, and a Treasurer. These officers shall be

the officers of the Association and shall serve without compensation for one year or until their successors have been duly elected and installed in office. It shall be the duty of the Chairman to preside at all meetings of the Association. In the absence of the Chairman or in case of his incapacity it will be the duty of the Vice-Chairman to perform the duties of the Chairman.

The parties hereto may by a majority vote of the entire membership employ an Executive Secretary who under the supervision of the Association Chairman, shall perform such duties as the Association may direct.

*FIFTH:*

Association meetings shall be held at the request of the Chairman or any two (2) members at places, dates, and hours to be mutually agreed upon by the parties hereto from time to time. All actions under this agreement shall be by a majority vote of the members, except as otherwise specifically provided in the agreement. A quorum at all meetings of the Association shall consist of two-thirds of the members.

*SIXTH:*

The parties hereto agree that their respective tariffs, rates, charges, classifications, rules and regulations, and additions thereto and changes therein, adopted pursuant to this agreement and covering the subject matter referred to in Article Third shall be filed promptly with the Agency. They further agree that no changes in said tariffs, rates, charges, classifications, and rules and regulations shall be made without prior notice of such changes to members of the Association, who shall be afforded an opportunity for consultation and for the making of such exceptions as they may desire in the tariff rates, charges, classifications, and rules and regulations, with the understanding that the party

proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other parties hereto, but not earlier than forty days after notice of the prior notice hereinabove referred to.

No change governed by this Article Sixth shall become effective until after thirty days' notice to the public unless good cause exists for a change on shorter notice. The reasons for such shorter notice shall be forwarded to the Agency. Without withdrawing, any party may except itself from the application of this agreement with respect to one or more of the items set forth in Article Third, provided that written notice of such intention is given at least sixty days in advance of the intended date of the exception to the Chairman.

A copy of such intended exception shall be dispatched promptly by the Association to the Agency.

*SEVENTH:*

Each of the parties hereto agrees to adhere to the rates, tariffs, charges, classifications, and rules and regulations published by the Association covering the subject matter described in Article Third. No party to this agreement shall deviate therefrom except as provided herein directly or indirectly, and no rates or charges assessed or collected pursuant thereto shall be directly or indirectly refunded or remitted.

*EIGHTH:*

Any person, firm, or corporation meeting the qualifications set forth in Article First, or giving substantial and reliable evidence of its intention to meet such qualifications, may become a member of this Association upon the approval of two-thirds of the parties hereto, by affixing its signature to this agreement, or a counterpart thereof. No admission to membership shall become effective prior to the date of written advice thereof to the Agency.

Every application for membership shall be acted upon promptly. No applicant shall be denied admission except for just and reasonable cause, and advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Agency.

*NINTH:*

Any expense incurred in carrying out this agreement shall be prorated among the parties hereto as they shall from time to time determine.

*TENTH:*

Any party hereto shall have the right to withdraw from this agreement provided that written notice of such withdrawal is given at least sixty days in advance of the intended date of withdrawal to the Chairman. During the period before the effective date of withdrawal the withdrawing party agrees to be bound by all of the provisions of this agreement. A withdrawing party also shall remain liable for all dues or assessments outstanding against it.

*ELEVENTH:*

The invalidations, nullification, alteration, limitation, modification, change or amendment of any part or provision of this agreement shall not affect the validity of any other part or provision hereof.

*TWELFTH:*

This agreement may be executed in as many original counterparts as desired and shall be binding upon such party, his or their heirs, executors, administrators, successors, or assigns. In the event the agreement is assigned to the successors or assigns of any of the parties, notice thereof, together with copy of the assignment agreement, shall be filed with the Agency.

*THIRTEENTH:*

Nothing contained in this agreement shall interfere with the right of any party under the provisions of the Shipping Act, 1916, (as amended), or the jurisdiction of the Agency.

*FOURTEENTH:*

This agreement may be amended by a two-thirds unanimous vote of the parties hereto. However, no such amendment shall be made effective until filed and approved by the Agency.

*FIFTEENTH:*

This agreement shall be executed in triplicate, two (2) copies to be filed with the Agency, Washington, D. C., and one copy to be held by the Association.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their respective officers or agents thereunto duly authorized the day and year herein first indicated.

MASSACHUSETTS PORT AUTHORITY (Maritime Division)

By (Sgd.) Joseph J. Connolly
Title Supt. of Terminals (M.P.A.)

THE MYSTIC TERMINAL COMPANY
By (Sgd.) P. J. Mullaney Title Pres.

TERMINAL OPERATORS, INC.
By (Sgd.) J. L. Haskell Title Gen. Mgr.

WIGGIN TERMINALS, INC.
By (Sgd.) Sherman L. Whipple Title Pres.

NEW YORK CENTRAL SYSTEM (BOSTON & ALBANY DIVISION)
By (Sgd.) Warren H. White Title N.E.F.S.M.

2. Port of Boston Marine Terminal Association—
Terminal Tariff No. 1
*Exhibit B* to Petition for Declaratory Judgment
(Appendix, Vol. I, p. 12)
*Exhibit C* to Affidavit of Sherman L. Whipple
(Appendix, Vol. I, p. 20)

**TERMINAL TARIFF No. 1**

REGULATIONS AND CHARGES

OF THE

TERMINAL OPERATORS NAMED HEREIN

Issued by

Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Mass. 02129

Issued: –
December 21, 1964

Effective: –
January 21, 1965

If additional copies of this tariff are requested they may be obtained by sending $1.00 per copy to the above issuing agent.

Original Title Page

F.M.C. T-No. 1

Cancels: –

F.M.B. T-No. 2 (The Mystic Terminal Co.)
F.M.B. T-No. 3 (Wiggin Terminals, Inc. )
F.M.B. T-No. 1 (Terminal Operators, Inc.)
F.M.B. F-No. 7 (The New York Central Railroad Co.)
Tariff No. PEC 12, F.M.B. No. 1 (Massachusetts Port Authority)

**PORT OF BOSTON**

**MARINE TERMINAL ASSOCIATION**

**FEDERAL MARITIME COMMISSION AGREEMENT No. 8785**

# TERMINAL TARIFF No. 1

REGULATIONS AND CHARGES

OF THE

TERMINAL OPERATORS NAMED HEREIN

Issued by

Sherman L. Whipple
Chairman
50 Terminal Street
Boston,29, Mass.

Issued: –

June 15, 1962

Effective: –

July 1, 1962

If additional copies of this tariff are requested they may be obtained by sending$1.00 per copy to the above issuing agent.

First Revised Page No. 1
F.M.C. T-No. 1
(Cancels Original Page No. 1)

## PARTICIPATING TERMINAL OPERATORS

| NAME | ADDRESS | ZIP CODE NO. |
|---|---|---|
| MASSACHUSETTS PORT AUTHORITY (MARITIME DIVISION) | COMMONWEALTH PIER No. 5<br>BOSTON, MASSACHUSETTS | 02210 |
| NEW YORK CENTRAL SYSTEM (BOSTON AND ALBANY DISTRICT) | PIERS NOS. 1, 3, 4, 5<br>EAST BOSTON, MASSACHUSETTS | 02128 |
| *PORT TERMINALS, INC. | BOSTON ARMY BASE TERMINAL<br>666 SUMMER STREET<br>BOSTON, MASSACHUSETTS | 02210 |
| THE MYSTIC TERMINAL COMPANY (SUBSIDIARY BOSTON & MAINE RAILROAD) | HOOSAC PIER No. 1<br>MYSTIC PIER No. 1<br>WATER STREET<br>BOSTON, MASSACHUSETTS | 02129 |
| WIGGIN TERMINALS, INC. | CASTLE ISLAND TERMINAL<br>PIER 51<br>50 TERMINAL STREET<br>BOSTON, MASSACHUSETTS | 02129 |

Issued: –
December 21, 1964

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Massachusetts

Effective: –
January 21, 1965

Original Page No. 1
F.M.C. T-No. 1

## PARTICIPATING TERMINAL OPERATORS

| NAME | ADDRESS |
|---|---|
| MASSACHUSETTS PORT AUTHORITY (MARITIME DIVISION) | COMMONWEALTH PIER No. 5 BOSTON 10, MASSACHUSETTS |
| NEW YORK CENTRAL RAILROAD CO. (BOSTON AND ALBANY DISTRICT) | PIER Nos. 1, 3, 4, 5 EAST BOSTON 28, MASSACHUSETTS |
| TERMINAL OPERATORS, INC. | BOSTON ARMY BASE TERMINAL 666 SUMMER STREET BOSTON 10, MASSACHUSETTS |
| THE MYSTIC TERMINAL COMPANY (SUBSIDIARY BOSTON & MAINE RAILROAD) | HOOSAC PIER No. 1 & MYSTIC PIER No. WATER STREET BOSTON 29, MASSACHUSETTS |
| WIGGIN TERMINALS, INC. | CASTLE ISLAND TERMINAL & PIER 51 50 TERMINAL STREET BOSTON 29, MASSACHUSETTS |

Issued: –
June 15, 1962

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Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

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First Revised Page No. 2
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Issued: –
June 15, 1962

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Effective: –
July 1, 1962

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Original Page No. 3
F.M.C. T-No. 1

## DEFINITION OF TERMS USED IN THIS TARIFF

1 – The Term Cargo refers to merchandise to be loaded on or discharged from a vessel.

2 – The Term Dockage refers to the charge assessed against the vessel for the service of providing space alongside of wharf, pier, or seawall structure for the docking or berthing of water craft, or for the mooring thereof, or other water craft so docked.

3 – The Term Free Time refers to the period during which cargo is allowed to remain on a pier free of charge, immediately prior to the loading of the vessel or subsequent to its discharge from a vessel.

4 – The Term Legal Holidays as used in this tariff means the following: –

| | |
|---|---|
| New Year's Day | (January 1) |
| Washington's Birthday | (February 22) |
| Patriots' Day | (April 19) |
| Memorial Day | (May 30) |
| Bunker Hill Day | (June 17) |
| Independence Day | (July 4) |
| Labor Day | (First Monday in September ) |
| Columbus Day | (October 12) |
| Veterans' Day | (November 11) |
| Thanksgiving Day | (Last Thursday in November) |
| Christmas Day | (December 25) |

Or any day celebrated in lieu thereof.

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(Cancels Original Page No. 4)

## DEFINITIONS (CONTINUED)

| | | | |
|---|---|---|---|
| 5 | – | The Term Person | refers to vessels, agents, owners, masters, operators; includes but is not limited to natural persons, artificial persons, corporations, partnerships, organizations and associations; to sovereigns, governments, nations, states, municipalities, and agents and/or instrumentalities thereof. |
| 6 | – | The Term Pier or Wharf | refers to a facility operated by any of the participating members named in this tariff. |
| 7 | – | The Term Terminal | refers to the operator of the pier. |
| *8 | – | The Term Wharfage | refers to the charge assessed against all cargo passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at pier or wharf or when moored in slip adjacent to pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charge for any other service. |
| *9 | – | The Term Wharf Demurrage | refers to the charge assessed against cargo remaining on a pier or wharf after the expiration of free time. |
| *10 | – | The Term Vessel | refers to floating craft of every description, and includes the owner and/or operator and/or such other persons acting as agent thereof, and they shall be jointly and severally responsible for the payment of all charges accrued by the vessel. |

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5 – The Term Per

**)EFINITIONS (CONTINUED)**

| | |
|---|---|
| on | refers to vessels, agents, owners, masters, operators; includes but is not limited to natural persons, artificial persons, corporations, partnerships, organizations and associations; to sovereigns, governments, nations, states, municipalities, and agents and/or instrumentalities thereof. |
| 6 – The Term Pie | |
| 7 – The Term Te or Wharf | refers to a facility operated by any of the participating members named in this tariff. |
| 8 – The Term Wl | |
| minal | refers to the operator of the pier. |
| arfage | refers to the charge assessed against cargo relating to all cargo passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at pier or wharf or when moored in slip adjacent to pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service. |
| 9 – The Term W | |
| 10 – The Term V | |
| arf Demurrage | refers to the charge levied against cargo remaining on a pier or wharf after the expiration of free time. |
| sel | refers to and includes the owner and/or operator of the vessel or such other persons acting as agent thereof, and they shall be jointly and severally responsible for the payment of all charges accrued by the vessel. |

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First Revised Page 5
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(Cancels Original Page 5)

## DEFINITIONS (CONTINUED)

11 – Symbols listed below are to denote changes when amendments to this tariff are issued: –

| | |
|---|---|
| + | Increase |
| – | Decrease |
| * | Change in wording, resulting in neither increase nor decrease. |
| ** | New Item |
| *** | Deletion |

Where substantially all items on a page are increased or decreased, it shall be so stated at the top of the page. Any exceptions will be marked by a dot ". ".

**12 – STRIKE STORAGE

Refers to the charge assessed against cargo on the pier at the commencement of a strike which prevents receipt or delivery of cargo.

13 – Intentionally left blank.

14 – Intentionally left blank.

15 – Abbreviations: –

| | | |
|---|---|---|
| Lbs. | = | Pounds |
| Ft. | = | Feet |
| KWH | = | Kilowatt Hour |
| Sq. | = | Square |
| N.C. | = | No Charge |

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## DEFINITIONS (CONTINUED)

11 – Symbols listed below are to denote changes when amendments to this tariff are issued.

| | |
|---|---|
| + | Increase |
| – | Decrease |
| * | Change in wording, resulting in neither increase or decrease. |
| ** | New item |
| *** | Deletion |

Where substantially all items on a page are increased or decreased, it shall be so stated at the top of the page. Any exceptions will be marked by a dot ". ".

12 – Intentionally left blank.

13 – Intentionally left blank.

14 – Intentionally left blank.

15 – Abbreviations: –

| | |
|---|---|
| Lbs. | Pounds |
| Ft. | Feet |
| KWH | Kilowatt Hour |
| Sq. | Square |
| N.C. | No Charge |

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## RULES AND REGULATIONS

### Item 1 – ACCEPTANCE OF RULES AND REGULATIONS

A – The use of a pier or wharf or any facility thereof by any person constitutes full acceptance of the rates, rules, terms, and conditions stated herein, or such other rules and conditions which may be issued by the Terminal at any time.

*B – In the event that any action required under this Tariff is not taken by the person responsible therefor, the Terminal shall have the right to take such action on its own behalf, and the cost thereof shall become the obligation of the person initially responsible therefor.

### Item 2 – APPLICATION FOR BERTHS AND BERTH ASSIGNMENTS

A – All vessels desiring a berth at a pier or wharf operated by a Terminal, shall, as far in advance of the date of docking as possible, make application therefore to the Terminal specifying the estimated date and time of arrival and/or sailing, also the nature and quantity of cargo.

B – Bulk Cargo Berths – Army Base

1 – Berths 6 and 10 are designated bulk cargo berths, and vessels that have bulk cargo to load or discharge will be assigned to these berths. Bulk cargo will not be loaded or discharged at other berths except by direction of the Terminal.

2 – One gantry crane is assigned to each of the bulk cargo berths.

3 – Vessels will be assigned to Berths 6 and 10 in order of their arrival in the port, provided they are ready to load or discharge with sufficient cargo available.

(Item 2 continued on next page)

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## RULES AND REGULATIONS

Item 1 – ACCEPTANCE OF RULES AND REGULATIONS

A – The use of a pier or wharf or any facility thereof by any person constitutes full acceptance of the rates, rules, terms, and conditions stated herein, or such other rules and conditions which may be issued by the Terminal at any time.

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Item 2 – APPLICATION FOR BERTHS AND BERTH ASSIGNMENTS

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(Item 2 continued on next page)

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RULES AND REGULATIONS (CONTINUED)

Item 2 – APPLICATION FOR BERTHS AND BERTH ASSIGNMENTS (Continued)

4 – Arrival of vessels at the port is determined by the time entered in the log of the Boston Pilots when vessel is boarded by a Pilot; or if no pilot is used, the time vessel is logged as passing the outer Pilot Station.

C – Grain Cargo Berths – Hoosac Pier No. 1, Berth 3
East Boston Pier No. 4, East Side

1 – Except as otherwise provided in these rules, grain vessels will be assigned available berths at Hoosac Pier, Berth 3, and East Boston Pier 4, East Side, to load grain from Grain Elevator in the order of arrivals and after issuance of certificate of readiness by the port representatives of the National Cargo Bureau, Inc., provided that quantity, kind, quality, and grade of grain is in the custody of the elevator; and further, that all Governmental regulations covering the handling and shipment of grain for export have been complied with.

2 – In order to expedite the movement of grain vessels and to secure the fullest possible use of the grain handling facilities in the port, whenever there are one or more grain vessels in port, in addition to a grain vessel on berth, ready and waiting to load, the grain vessel on berth will be required to work overtime at vessel's expense, if necessary, to make berth available. Any grain vessel on berth which refuses to work overtime will forfeit its right to the berth and shall vacate the berth on order of the Terminal.

(Item 2 continued on next page)

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RULES AND REGULATIONS (CONTINUED)

Item 2 – APPLICATION FOR BERTHS AND BERTH ASSIGNMENTS (Continued)

D – Preferential assignment will be extended to all passenger vessels embarking or disembarking passengers at Commonwealth Pier No. 5

E – Whenever necessary for the proper operation of a pier, and/or its facilities, a Terminal may order a vessel to move to such place as the Terminal directs at the expense of the vessel.

Item 3 – RESPONSIBILITY FOR LOSS OR DAMAGE

A – The Terminal, its officers, agents, or employees, shall not be responsible for loss or damage by whomsoever caused to vessels, persons; or to cargo or any other property in or upon, or moving or being moved over, in, through, or under any wharf or other structure or property owned, controlled, or operated by the Terminal, resulting from any cause whatsoever, including but not limited to loss or damage which in any manner is caused by or results from the following: – theft, pilferage, animals, including rats, mice and other rodents; birds, insects, including moths and weevil; shrinkage, wastage, seepage, leaking containers; heating; evaporation; fire, or extinguishment thereof; explosion; leakage; discharge from fire protection system; dampness, rain; floods, freezing, frost or other action of the elements or acts of God; collapse of walls, piers, or other structures; breakdown of plant, machinery or equipment; floats, logs, or piling required to breast vessels away from wharves; sabotage, insurrection, revolution or war; riot; or strikes, or any combination of the foregoing.

B – The rates contained herein do not include insurance of any kind. Insurance should be procured by the interested party.

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## RULES AND REGULATIONS (CONTINUED)

Item 2 – APPLICATION FOR BERTHS AND BERTH ASSIGNMENTS (Continued)

D – Preferential assignment will be extended to all passenger vessels embarking or disembarking passengers at Commonwealth Pier No. 5.

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RULES AND REGULATIONS (CONTINUED)

em 4 – EXPLOSIVES AND DANGEROUS OR OBNOXIOUS CARGOES

A – No gunpowder, explosives, or dangerous or obnoxious cargoes shall be discharged or loaded upon the piers, or structures, or vessels at the piers, except by permission of the Terminal.

B – The handling of explosives and other dangerous articles is subject to all applicable laws, rules and regulations promulgated by The United States of America, The Commonwealth of Massachusetts, The City of Boston, and other competent and proper authorities.

C – If handling is permitted, cargo of RED or YELLOW designation, or acids, corrosive liquids, or poisons, whether designated or not by label. for loading to vessel, shall not be allowed on piers until the day of the vessel's sailing and the Terminal Superintendent shall be notified in advance of receiving, in order that a suitable location may be designated for place of rest pending loading. Inbound, such cargo shall be removed from the pier forthwith on the day it is discharged.

D – The Terminal may require the vessel or owner of cargo to employ special watchmen at the expense of the vessel or owner of the cargo, to watch any dangerous cargo on the pier, when in the judgment of the Terminal such action is necessary to protect the property and cargoes against fire or other hazards until the condition is eliminated.

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First Revised Page No. 10
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(Cancels Original Page No. 10)

## RULES AND REGULATIONS (CONTINUED)

Item 5 – MOVEMENT OF CARGO

The Terminal may move cargo from pier facilities to safeguard life and property, at the risk and expense of the vessel, or cargo.

Item 6 – ACCESS TO SHIPPING RECORDS

The vessel will be required to allow the Terminal or its agents to have access to the manifest of cargo, loading list, or other transportation documents at the time the vessel starts loading or discharging, or prior to that time if available, for the purpose of supervising the proper use of the pier, and obtaining the data necessary to permit the correct determination of charges.

Item 7 – LIMITING WEIGHTS

Cargo shall be stacked or piled on the piers or pier aprons so as to produce a uniform loading for the area covered, no greater than the load limits as prescribed by the Terminal.

*A – Wiggin Terminals, Inc., Castle Island and Pier 51, no greater than 500 lbs. per sq. ft.

B – Massachusetts Port Authority (Maritime Division):
Commonwealth Pier No. 5, no greater than 500 lbs. per sq. ft., first floor; and 300 lbs. per sq. ft. on 2nd floor

*C – Port Terminals, Inc., Boston Army Base, wharf aprons, 500 lbs. per sq. ft.; wharf shed, first floor, 600 lbs. per sq. ft.; second floor, 400 lbs. per sq. ft.; pier sheds, first floor, 500 lbs. per sq. ft.; second and third floors, 300 lbs. per sq. ft.

D – Sling loads using the cargo masts of the Boston Army Base Terminal should not exceed 4,000 lbs.; at Commonwealth Pier No. 5 – 6,000 lbs.

E – Mystic Terminal Co., Hoosac Pier No. 1 and Mystic Pier No. 1, 600 lbs. per sq. ft.

F – New York Central System (Boston and Albany District) Pier No. 1, 500 lbs. per sq. ft.; Piers Nos. 3 and 4, 500 lbs. per sq. ft.

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**RULES AND REGULATIONS (CONTINUED)**

Item 5 – MOVEMENT OF CARGO

The Terminal may move cargo from pier facilities to safeguard life and property, at the risk and expense of the vessel, or cargo.

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The vessel will be required to allow the Terminal or its agents to have access to the manifests of cargo, loading list, or other transportation documents at the time the vessel starts loading or discharging, or prior to that time if available, for the purpose of supervising the proper use of the pier, and obtaining the data necessary to permit the correct determination of charges.

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A – Wiggins Terminals, Inc., no greater than 500 lbs. per sq. ft.

B – Massachusetts Port Authority (Maritime Division) Commonwealth Pier No. 5, no greater than 500 lbs. per sq. ft., first floor; and 300 lbs. per sq. ft. on 2nd floor.

C – Terminal Operators, Inc., wharf aprons, 500 lbs. per sq. ft.; wharf shed, first floor, 600 lbs. per sq. ft.; second floor, 400 lbs. per sq. ft.; pier sheds, first floor, 500 lbs. per sq. ft.; second and third floors, 300 lbs. per sq. ft.

D – Sling loads using the cargo masts of the Boston Army Base Terminal should not exceed 4,000 lbs.; at Commonwealth Pier No. 5 – 6,000 lbs.

E – Mystic Terminal Co., Hoosac Pier No. 1 and Mystic Pier No. 1, 600 lbs. per sq. ft.

F – New York Central Railroad Co. (Boston and Albany District) Pier No. 1, 500 lbs. per sq. ft., Piers Nos. 3 and 4, 500 lbs. per sq. ft.

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## RULES AND REGULATIONS (CONTINUED)

Item 8 – DISPOSITION OF CARGO

A – The Terminal may require the vessel to refuse delivery or loading of cargo until all Terminal charges have been paid.

B – The Terminal reserves the right at their option to require the vessel to store in public warehouse or move to another location on the pier, at the entire risk and expense of the vessel or owner, all cargo which is not removed at the expiration of the prescribed free time. The Terminal is to have a lien on such cargo in the warehouse for all Terminal charges due.

Item 9 – ABANDONED CARGO

If cargo (such as damaged or unsaleable cargo) is abandoned and left upon the pier, the vessel will be responsible for removal of such cargo at its own expense, and for reimbursement to the Terminal if any wharfage, wharf demurrage or other charges have accumulated.

Item 10– DUNNAGE AND RUBBISH

A – If dunnage material, packaging material, wires, bands, or refuse of any kind, have accumulated on the pier, the vessel will be held responsible for the prompt removal of such material immediately at the completion of stevedoring operations, and such removal is to be at its own expense. If such requirement is not promptly complied with, the Terminal will immediately remove such material, and the expense incurred will be charged to the vessel.

B – Any claims for injury to persons, or damage to material or equipment because of such packaging material, wires, bands, or refuse of any kind accumulating on the pier, shall be the responsibility of the vessel.

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RULES AND REGULATIONS (CONTINUED)

Item 11 – USE OF PREMISES

A – Vessels when moored to the pier shall have on board at all times sufficient personnel to move said vessel in case of necessity for the protection of the vessel and/or other property.

B – Representatives of the vessel, and all persons having business with it, shall not be allowed to park automobiles on the premises without express permission from the Terminal. When such permission is granted, parking shall be entirely at the risk of the owner and/or operator.

C – No Smoking shall be allowed on any pier, except in approved areas or locations specifically designated for that purpose on the pier or areas adjacent thereto. Persons violating this rule may be barred, at the discretion of the Terminal, from the further use of any pier or area adjacent thereto, and in addition, shall be subject to prosecution under the applicable Federal, State, and Municipal laws.

D – The vessel shall handle cargo and equipment so there shall be at all times: –

1 – A minimum area of four feet (4 ft.) on all sides of fire hydrants, fire alarm boxes, and fire-fighting equipment kept free, unobstructed, and with direct access.

2 – Free, unobstructed, and direct access to all buildings, and fire hydrants by the City of Boston or Terminal fire equipment.

3 – Free and unobstructed operation of automatically closing fire-doors.

4 – Two feet (2 ft.) aisle space between all cargo and sidewalls, bulkheads, partitions, doors, windows, or any parts of the premises; to prevent damage, and to comply with the regulations of the U. S. Coast Guard, Boston Fire Department, and other regulatory agencies.

(Item 11 continued on next page)

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RULES AND REGULATIONS (CONTINUED)

Item 11 – USE OF PREMISES (Continued)

5 – Cargo piled so as not to exceed the floor load limits as prescribed in Item 7.

E – Vessels and other users of the facilities shall confine their operations to the area designated by the Terminal.

Item 12 – DAMAGE TO TERMINAL PROPERTY

In the event any damage is done to Terminal property, the person or persons responsible for causing said damage, or any way involved, shall give a full report to the Terminal, giving the date and hour the damage occurred, names and addresses or description of witnesses or other persons, vessels, vehicles, or instrumentalities involved, as well as any other pertinent facts and information which may be available. The person causing the damage will be held responsible for reimbursing the Terminal for the cost of repairing said damage.

Item 13 – CARGO AVAILABLE FOR DELIVERY

The vessel shall be responsible for making cargo on the pier available for delivery to consignee or vessel. When it becomes necessary to move, sort, break down, or high pile cargo to make it available for delivery, this shall be done at the expense of the vessel.

Item 14 – FREE TIME

*A – Inward Cargo

1 – Cargo, not otherwise specified, unloaded from vessel, may remain on the pier or location assigned by the Terminal for five (5) days after the vessel completes discharging without wharf demurrage charges. (See Exception)

(Item 14 continued on next page)

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50 Terminal Street
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**RULES AND REGULATIONS (CONTINUED)**

Item 11 – USE OF PREMISES (Continued)

5 – Cargo piled so as not to exceed the floor load limits as prescribed by Item 7.

E – Vessels and other users of the facilities shall confine their operations to the area designated by the Terminal.

Item 12 – DAMAGE TO TERMINAL PROPERTY

In the event any damage is done to Terminal property, the person or persons responsible for causing said damage, or any way involved, shall give a full report to the Terminal, giving the date and hour the damage occurred, names and addresses or descriptions of witnesses or other persons, vessels, vehicles, or instrumentalities involved, as well as any other pertinent facts and information which may be available. The person causing the damage will be held responsible for reimbursing the Terminal for the cost of repairing said damage.

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Item 14 – FREE TIME

A – Import Cargo

1 – Cargo, not otherwise specified, unloaded from vessel, may remain on the pier or location assigned by the Terminal for five (5) days after the vessel completes discharging without wharf demurrage charges. (See Exception)

(Item 14 continued on next page)

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**RULES AND REGULATIONS (CONTINUED)**

Item 14 – FREE TIME (Continued)

Exception:

Woodpulp, when unloaded from vessels at Mystic and Hoosac, Pier 51, and New York Central Terminals, and when inland movement from pier is by rail, may remain on the pier for fifteen (15) days after the vessel completes discharging without wharf demurrage charges.

*B – Outward Cargo:

Cargo may be assembled on the pier for movement to foreign or domestic ports free of wharf demurrage charges for seven (7) days before the vessel commences to load.

*C – Free time will be computed from 8:00 A.M., on the first day after vessel completes discharge, or from 8:00 A.M., on the first day after cargo arrives for delivery to vessel. In computing free time, Saturdays, Sundays, legal holidays (Item 4, Section I), and strike storage days (Page 20, Item 11), will be excluded. When a holiday falls on Sunday, the following Monday will be excluded.

**Item 15 – For rules and regulations and rates specifically governing lumber vessels discharging at the Castle Island Terminal see Wiggin Terminals' F.M.C. Lumber Tariff. Wiggin Terminals' F.M.C. Lumber Tariff is only applicable on those vessels discharging lumber which is backhauled by Wiggin Terminals, Inc., at Castle Island.

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**RULES AND REGULATIONS (CONTINUED)**

Item 14 – FREE TIME (Continued)

Exception:

Woodpulp, when unloaded from vessels at Mystic and Hoosac, Pier 51, and New York Central Terminals, and when inland movement from pier is by rail, may remain on the pier for fifteen (15) days after the vessel completes discharging without wharf demurrage charges.

B – Export Cargo:

Cargo may be assembled on the pier for export to foreign or domestic ports free of wharf demurrage charges for seven (7) days before the vessel commences to load.

*C – Free time will be computed from 8:00 A.M., on the first day after vessel completes discharge, or from 8:00 A.M., on the first day after cargo arrives for delivery to vessel. In computing free time, Saturdays, Sundays, legal holidays (Item 4 – Section I), strike storage days (Item 4-E, Section III) will be excluded. When a holiday falls on Sunday, the following Monday will be excluded.

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Item 18 – Intentionally left blank.

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**RULES AND REGULATIONS (CONTINUED)**

Item 14 – FREE TIME (Continued)

Exception:

Woodpulp, when unloaded from vessels at Mystic and Hoosac, Pier 51, and New York Central Terminals, and when inland movement from pier is by rail, may remain on the pier for fifteen (15) days after the vessel completes discharging without wharf demurrage charges.

B – Export Cargo:

Cargo may be assembled on the pier for export to foreign or domestic ports free of wharf demurrage charges for seven (7) days before the vessel commences to load.

C – Free time will be computed from 8:00 A.M., on the first day after vessel completes discharge, or from 8:00 A.M., on the first day after cargo arrives for delivery to vessel. In computing free time, Saturdays, Sundays, and Legal Holidays (Item 4 – SECTION I), will be excluded. When a holiday falls on Sunday, the following Monday will be excluded.

Item 15 – Intentionally left blank.

Item 16 – Intentionally left blank.

Item 17 – Intentionally left blank.

Item 18 – Intentionally left blank.

Issued: –
June 15, 1962

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Effective: –
July 1, 1962

Original Page No. 15
F.M.C. T-No. 1

## CHARGES

Item 1 – DOCKAGE

A – Cargo not otherwise specified, discharged from and/or loaded on vessels; per ton of 2,000 lbs., or 40 cubic feet, as determined from vessel's manifest. (See Note and Exception.) $ .20

Note:

When merchandise is carried on a package basis on vessel's manifest, the charges for computing dockage revenue will be based on weight per ton of 2,000 lbs., or per 40 cubic feet, whichever yields the greater revenue.

B – Minimum charge per designated berth for each day or portion thereof a vessel occupies a berth or portion thereof. (See Exception.) $100.00

C – Lumber (applies at Castle Island Terminal only) handled to open space in accordance with Wiggin Terminals' Lumber Tariff in effect, as determined by vessel's manifest, per 1,000 net board feet. $ .20

D – A Dockage Day will consist of 24 hours, or fraction thereof, commencing at the time the vessel is berthed, including Saturdays, Sundays, and holidays.

Exception:

No dockage charge will be assessed on Bulk Grain or Soya Beans delivered from Grain Elevators. When vessel loads or discharges general cargo at the same berth while loading bulk grain or soya beans from Grain Elevators, dockage charges will be assessed on the general cargo as provided in Paragraph "A" above, and the provisions in Paragraph "B" above will not apply.

Issued by
Sherman L. Whipple
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50 Terminal Street
Boston 29, Mass.

Issued: – June 15, 1962

Effective: – July 1, 1962

First Revised Page No. 16
F.M.C. T-No. 1
(Cancels Original Page No. 16)

CHARGES (CONTINUED)

Item 2 – WHARFAGE (See Exception)

*A – Wharfage charges are due when rendered. The Terminal at its discretion may refuse delivery of cargo until all charges are paid, including wharf demurrage charges which may accrue because of holding cargo.

B – Cargo (including ballast) not otherwise specified, per ton of 2,000 lbs. $1.75

C – Cargo interchanged overside between vessels and lighters, or handled direct from vessel to truck, or from truck to vessel, per ton of 2,000 lbs. $ .87½

D – Lumber (See Note 2) handled to open space in accordance with Wiggin Terminals' Lumber Tariff in effect, (as determined by vessel's manifest), per 1,000 net board feet. $ .45

E – Cargo trans-shipped between water carriers using participating Terminals, per ton of 2,000 lbs. at each Terminal used. $1.00

F – Minimum Charge per shipment. $1.75

Minimum charges must be paid before removal of cargo from pier.

Exception:

*Naphtalene in freight cars; Bunker Coal; Fuel Oil; Ship's Stores; Freight handled direct from vessel to car or from car to vessel; Freight arriving at or leaving from Terminal in railroad cars, from or to points located outside the Boston Switching District. (See Note 3). N.C.

* * * Note 1:

(Item 2 continued on next page)

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Mass. 02129

Issued: – December 21, 1964

Effective: – January 21, 1965

Original Page No. 16
F.M.C. T-No. 1

## CHARGES (CONTINUED)

Item 2 – WHARFAGE (See Exception)

A – Wharfage charges are due when rendered. The Terminal at its discretion may refuse delivery of cargo until all charges are paid, including wharf demurrage charges which may accrue because of holding cargo. (See Note 1.)

B – Cargo (including ballast) not otherwise specified, per ton of 2,000 lbs. $1.75

C – Cargo interchanged overside between vessels and lighters, or handled direct from vessel to truck, or from truck to vessel, per ton of 2,000 lbs. $ .87½

D – Lumber (See Note 2) handled to open space in accordance with Wiggin Terminals' Lumber Tariff in effect, (as determined by vessel's manifest), per 1,000 net board feet. $ .45

E – Cargo trans-shipped between water carriers using participating Terminals, per ton of 2,000 lbs. at each Terminal used. $1.00

F – Minimum Charge per shipment. $1.75

Minimum charges must be paid before removal of cargo from pier.

Exception:

Naphthalene in freight cars; Bunker Coal; Fuel Oil; Ship's Stores; Freight handled direct from vessel to car or from car to vessel; Freight handled by rail to or from points located outside the Boston Switching District. (See Note 3.) N.C.

Note 1:

Wharfage assessed on cargo moved on an inland movement by the New York, New Haven & Hartford Railroad will be credited to the consignee, less any charges for wharf demurrage or any other charges which may have accrued.

(Item 2 continued on next page)

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June 15, 1962

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Effective: –
July 1, 1962

Original Page No. 17
F.M.C. T-No. 1

**CHARGES (CONTINUED)**

Item 2 – WHARFAGE (Continued)

Note 2:

Applies only at Castle Island Terminal.

Note 3:

The Boston Switching District comprises the corporate limits of the following cities of The Commonwealth of Massachusetts: – Boston, Chelsea, Cambridge, Revere, Medford, Somerville, and Everett.

G – The shipper of export cargo or the consignee of import cargo is responsible for the payment of the wharfage charge. The Terminal may arrange with vessels, agents or other parties for the collection of these charges, which shall be remitted to the Terminal. The collecting agent may retain a commission of 10 per cent.

Item 3 – PASSENGER CHARGES:

| | |
|---|---|
| A – Passengers embarking or disembarking – per passenger | $ 1.00 |
| B – Passenger gangways and baggage conveyors where available: | |
| Aluminum Gangways per request – each | $25.00 |
| Wooden Gangways per request – each | $10.00 |
| Baggage Conveyors per request – each | $10.00 |

Item 4 – WHARF DEMURRAGE

| | |
|---|---|
| A – Cargo, not otherwise specified, per 100 lbs. (Except Lumber as referred to in Item 1, Paragraph "C", Page No. 15.) – Per Day | $ .02½ |
| B – Export Cargo (Except Grain): | |
| For the first ten (10) days or fraction thereof per 100 lbs. | $ .06½ |
| For each succeeding ten (10) days or fraction thereof, per 100 lbs. | $ .02½ |

(Item 4 continued on next page)

Issued: –
June 15, 1962

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Effective: –
July 1, 1962

Third Revised Page No. 18
F.M.C. T-No. 1
(Cancels Second Revised Page No. 18)

**CHARGES (CONTINUED)**

C – Minimum charge per shipment, per day. $ 1.50

Minimums must be paid before shipments can be moved from the Terminal.

Item 4 – WHARF DEMURRAGE (Continued)

D – Wharf Demurrage will be assessed against the consignee of import cargo or the shipper of export cargo as shown on the original manifest or bill of lading. The Terminal may refuse delivery of cargo on wharf demurrage until all wharf demurrage charges are paid.

E – Now Item 10, Page 20.

F – The shipper or export cargo or the consignee of import cargo is responsible for the payment of Wharf Demurrage charges.

G – In computing Wharf Demurrage charges, Saturdays, Sundays, and legal holidays (Item 4, Section I) will be included. Any fractional part of one hundred (100) lbs. will be computed as one hundred (100) lbs., and any fractional part of twenty-four (24) hours will be computed as one (1) day.

Item 5 – USAGE CHARGE

A – Applies only at Castle Island, South Boston Army Base, and Commonwealth Pier No. 5.

B – When the inland movement is by railroad, the New York, New Haven & Hartford Railroad Company will pay to the Terminal fifteen (15) cents per ton of 2,000 lbs., on all cargo moved to or from the pier as compensation for the use of the tracks, sheds, and other facilities.

Item 6 – WATER, WHEN AVAILABLE

A – Per one hundred (100) cubic feet $ .25

B – Minimum charge per delivery $30.00

C – Service charge per delivery on straight-time $10.00

(Item 6 continued on next page)

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Mass. 02129

Issued: – December 21, 1964

Effective: – January 21, 1965

Second Revised Page No. 18
F.M.C. T-No. 1
(Cancels First Revised Page No. 18)

## CHARGES (CONTINUED)

Item 4 – WHARF DEMURRAGE (Continued)

D – Wharf Demurrage will be assessed against the consignee of import cargo or the shipper of export cargo as shown on the original manifest or bill of lading. The Terminal may refuse delivery of cargo on wharf demurrage until all wharf demurrage charges are paid.

*E – Strike storage, assessed on cargo prevented from removal from the Terminal will be assessed to the vessel when the vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel are on strike.

Per 100 lbs. per day for each day during which the failure of the vessel to deliver or load exists. $ .005

When removal of cargo is prevented by strike of Terminal employees no strike storage will be assessed during the period the situation exists.

F – The shipper of export cargo or the consignee of import cargo is responsible for the payment of Wharf Demurrage charges.

G – In computing Wharf Demurrage charges, Saturdays, Sundays, and legal holidays (Item 4, Section I) will be included. Any fractional part of one hundred (100) lbs. will be computed as one hundred (100) lbs., and any fractional part of twenty-four (24) hours will be computed as one (1) day.

Item 5 – USAGE CHARGE

A – Applies only at Castle Island, South Boston Army Base, and Commonwealth Pier No. 5.

B – When the inland movement is by railroad, the New York, New Haven & Hartford Railroad Company will pay to the Terminal fifteen (15) cents per ton of 2,000 lbs., on all cargo moved to or from the pier as compensation for the use of the tracks, sheds, and other facilities.

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Mass. 02129

Issued: – November 18, 1964

Effective: – December 18, 1964

First Revised Page 18
F.M.C. T-No. 1
(Cancels Original Page No. 18)

CHARGES (CONTINUED)

Item 6 – WATER, WHEN AVAILABLE

| | |
|---|---|
| A – Per one hundred (100) cubic feet | $ .25 |
| B – Minimum charge per delivery | $30.00 |
| C – Service charge per delivery on straight-time | $10.00 |

Item 4 – WHARF DEMURRAGE (Continued)

D – Wharf Demurrage will be assessed against the consignee of import cargo or the shipper of export cargo as shown on the original manifest or bill of lading. The Terminal may refuse delivery of cargo on wharf demurrage until all wharf demurrage charges are paid.

*E – Wharf Demurrage assessed on cargo prevented from removal from the Terminal will be assessed to the vessel when the vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel, are on strike.

– Per 100 lbs. per day for each day after expiration of free time that the situation exists. $ .005

When removal of cargo is prevented by strike of Terminal employees no Wharf Demurrage will be assessed.

F – The shipper of export cargo or the consignee of import cargo is responsible for the payment of Wharf Demurrage charges.

G – In computing Wharf Demurrage charges, Saturdays, Sundays, and Legal Holidays (Item 4, Section I) will be included. Any fractional part of one hundred (100) lbs. will be computed as one hundred (100) lbs., and any fractional part of twenty-four (24) hours will be computed as one (1) day.

Item 5 – USAGE CHARGE

A – Applies only at Castle Island, South Boston Army Base, and Commonwealth Pier No. 5.

B – When the inland movement is by railroad, the New York, New Haven & Hartford Railroad Company will pay to the Terminal fifteen (15) cents per ton of 2,000 lbs. on all cargo moved to or from the pier as compensation for the use of the tracks, sheds, and other facilities.

Issued: –
September 15, 1964

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Mass. 02129

Effective: –
September 30, 1964

Original Page No. 18
F.M.C. T-No. 1

CHARGES (CONTINUED)

Item 6 – WATER, WHEN AVAILABLE

| | |
|---|---|
| A – Per one hundred (100) cubic feet | $ .25 |
| B – Minimum charge per delivery | $30.00 |
| C – Service charge per delivery on straight-time | $10.00 |

Item 4 – WHARF DEMURRAGE (Continued)

D – Wharf Demurrage will be assessed against the consignee of import cargo or the shipper of export cargo as shown on the original manifest or bill of lading. The Terminal may refuse delivery of cargo on wharf demurrage until all wharf demurrage charges are paid.

E – Cargo prevented from removal by factors beyond consignee's control such as strikes, weather conditions, or similar situations affecting the entire Port area:

Per 100 lbs. per day for each day after expiration of free time that the situation exists. $ .01

F – The shipper of export cargo or the consignee of import cargo is responsible for the payment of wharf demurrage charges.

G – In computing wharf demurrage charges, Saturdays, Sundays, and Legal Holidays (Item 4, Section I) will be included. Any fractional part of one hundred (100) lbs. will be computed as one hundred (100) lbs., and any fractional part of twenty-four (24) hours will be computed as one (1) day.

Item 5 – USAGE CHARGE

A – Applies only at Castle Island, South Boston Army Base, and Commonwealth Pier No. 5.

B – When the inland movement is by railroad, the New York, New Haven & Hartford Railroad Company will pay to the Terminal fifteen (15) cents per ton of 2,000 lbs. on all cargo moved to or from the pier as compensation for the use of the tracks, sheds, and other facilities.

Item 6 – WATER, WHEN AVAILABLE

| | |
|---|---|
| A – Per one hundred (100) cubic feet. | $ .25 |
| B – Minimum charge per delivery | $30.00 |
| C – Service charge per delivery on straight-time | $10.00 |

(Item 6 continued on next page)

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Issued: –
June 15, 1962

Effective: –
July 1, 1962

Original Page No. 19
F.M.C. T-No. 1

## CHARGES (CONTINUED)

Item 6 – **WATER, WHEN AVAILABLE** (Continued)

D – Special arrangements for delivery of water on overtime periods must be made with the Terminal.

E – At the Boston Army Base, water will be supplied and charged for by the Post Engineer, at the rates given above, or at the prevailing applicable rate of the City of Boston, whichever is greater.

Item 7 – **ELECTRICITY, WHEN AVAILABLE**

| | | | |
|---|---|---|---|
| A – Lights, per berth: | | Half Night | $15.00 |
| | | Whole Night | $20.00 |
| B – Electric Power supplied: | | Per K.W.H. | $ .06 |
| | | Minimum Charge | $10.00 |
| C – Castle Island | Half Night | Per Tower | $ 5.00 |
| | Whole Night | Per Tower | $ 7.50 |

Item 8 – **DEPARTMENT OF THE ARMY CARGO**

Wharfage and wharf demurrage charges applicable to all Department of the Army cargo discharged from or loaded to water carriers at the Boston Army Base Terminal.

Per ton of 2,000 lbs., or per 40 cubic ft., whichever yields the greater revenue. $ .34

Item 9 – **GANTRY CRANES**

A – Applies only at Boston Army Base.

B – When available, gantry cranes will be charged to the user (excluding operator): Per Hour $15.00
Minimum Charge $25.00

C – When gantry cranes are used, the user will be charged for one (1) standby electrician for each crane, at cost.

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Issued: – June 15, 1962

Effective: – July 1, 1962

First Revised Page No. 20
F.M.C. T-No. 1
(Cancels Original Page No. 20)

## CHARGES (CONCLUDED)

Item 10 – SPECIAL CHARGES

The Terminal will arrange with the vessel for special charges to cover unusual conditions prevailing at a berth, whenever the occasion arises. The same charges would be made to all under similar conditions.

**Item 11 – STRIKE STORAGE

Strike storage assessed on cargo prevented from removal from the Terminal will be assessed to the vessel when the vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel are on strike.

Per 100 lbs. per day for each day during which the failure of the vessel to deliver or load exists. $ .005

When removal of cargo is prevented by a strike of Terminal employees, no strike storage will be assessed during the period in which the situation exists.

Item 12 – Intentionally left blank.

THE END

Issued: –
December 21, 1964

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston, Mass. 02129

Effective: –
January 21, 1965

## CHARGES (CONCLUDED)

Item 10 – SPECIAL CHARGES

The Terminal will arrange with the vessel for special charges to cover unusual conditions prevailing at a berth, whenever the occasion arises. The same charges would be made to all under similar conditions.

Item 11 – Intentionally left blank.

Item 12 – Intentionally left blank.

THE END

Issued: –
June 15, 1962

Issued by
Sherman L. Whipple
Chairman
50 Terminal Street
Boston 29, Mass.

Effective: –
July 1, 1962

If additional copies of this tariff are requested they may be obtained by sending $1.00 per copy to the above issuing agent.

3. *Strike Storage Charges*

*Exhibit C* to Petition for Declaratory Judgment [Appendix, Vol. I, p. 12]

| Plaintiff | Defendant | Amount |
|---|---|---|
| Massachusetts Port Authority | Peabody & Lane, Inc. | $ 108.76 |
| | Boston Shipping Corp. | 306.45 |
| | American President Lines | 1,921.15 |
| | Furness, Withy & Co. | 1,200.00 |
| Mystic Terminal Co. | American Export Lines, Inc. | 404.23 |
| | Boston Shipping Corp. | 328.28 |
| | Furness, Withy & Co. | 8,765.01 |
| | Moore-McCormack Lines, Inc. | 3,086.52 |
| | Moran Shipping Agencies, Inc. | 860.89 |
| New York Central Railroad Co. | United States Lines | 2,985.20 |
| | Farrell Lines | 1,550.40 |
| Port Terminals, Inc. | Sprague Steamship Agency, Inc. | 4,548.06 |
| | J. F. Moran & Co. | 1,158.63 |
| | Peabody & Lane, Inc. | 1,417.68 |
| | Norton, Lilly & Co. | 1,380.39 |
| Wiggin Terminals, Inc. | Norton, Lilly & Co. | 3,756.39 |
| | Patterson, Wylde & Co. | 2,890.80 |

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4. *Federal Maritime Commission Decision—Docket No. 66-28*

*Exhibit A* to Stipulation of Facts between plaintiffs and defendants [Appendix, Vol. I, p. 33]

*Exhibit J* to Stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix, Vol. I, p. 36]

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# FEDERAL MARITIME COMMISSION

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No. 66-28

THE BOSTON SHIPPING ASSOCIATION, INC., et al.

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, et al.

---

*Decided June 23, 1967*

Assessment of "strike storage" charges for cargo remaining on premises of terminal during longshoremen's strike is subject to the jurisdiction of the Commission as a practice within the meaning of section 17 of the Shipping Act, 1916.

A change in the terminal tariff rule governing the assessment of "strike storage" which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916, where rule is contained in a tariff filed with the Commission under an existing approved section 15 agreement, such change constituting neither a modification to the already approved basic agreement nor a new agreement within the meaning of section 15.

The assessment of the "strike storage" against the vessel for cargo still in "free time" when the strike begins does not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

While the assessment by a terminal of a charge against the vessel for services rendered to the cargo for benefit of the consignee raises issues under section 17 as to the justness and reasonableness of the allocation it does not constitute an undue or unreasonable prejudice under section 16 since the cargo and vessel are not users of the same service.

Cargo of the consignees was "prevented from removal" within the meaning of the strike storage provision of respondents' tariff by the longshoremen's strike and the application of that provision for the period in question did not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

*Leo F. Glynn, Esq.*, attorney for the complainants.

*John M. Reed, Esq.*, attorney for respondents other than Massachusetts Port Authority.

*George W. Stuart, Esq.* and *Neil L. Lynch, Esq.*, attorneys for Massachusetts Port Authority.

*Donald J. Brunner, Esq.* and *Samuel B. Nemirow, Esq.*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*)*

This proceeding arises out of a complaint filed April 21, 1966, by the Boston Shipping Association. Hearings were held before Examiner Benjamin A. Theeman who issued his decision February 17, 1967. Oral argument was held May 11, 1967. The complainant, the Boston Shipping Association, Inc., is a nonprofit Massachusetts corporation, whose members are ocean steamship companies, their agents, or stevedores, while the respondent (PBMTA) is an association of "other persons" subject to the Shipping Act, 1916, each of which owns or operates a marine terminal in connection with a common carrier by water. The complainant alleges that respondent has violated section 15 of the Act by putting certain tariff modifications into effect without first securing the approval of the Commission, and sections 16 and 17 of the Act by unjustly assessing against the vessel the charge for so-called "strike

* Commissioner Fanseen did not participate.

storage" of cargo during strikes of the vessel employees instead of assessing it to the cargo as had previously been the practice. The Examiner found violations of sections 16 and 17, but not section 15. Respondent and intervenor hearing counsel have taken exception to the Initial Decision and complainant has replied. Our conclusions differ somewhat from those of the Examiner.

## FACTS

Respondent PBMTA operates under approved Agreement No. 8785, Article Third of which provides that the agreement authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate charges, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission.

Pursuant to Agreement No. 8785, PBMTA issued Terminal Tariff No. 1, effective July 1, 1962. This tariff provided, among other things, for wharfage,[1] wharf demurrage,[2] dockage,[3] and free time.[4] It contained no provision

[1] The term "wharfage refers to the charge assessed against all cargo passing or conveyed over, onto or under wharves or between vessels or overside vessels when berthed at pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

[2] The term "wharf demurrage refers to the charge assessed against cargo remaining on a pier or wharf after the expiration of free time."

[3] The term "dockage refers to the charge assessed for the service of providing space alongside of wharf, pier or seawall structure for the docking or berthing of watercraft, or for the mooring thereof, or other watercraft docked."

[4] The term "free time refers to the period which cargo is allowed to remain on a pier free of charge, immediately prior to loading of the vessel or subsequent to its discharge from a vessel."

specifically dealing with strike storage. Under the tariff as originally filed, dockage was assessed against the vessel on general cargo at 20 cents a ton; wharf demurrage was assessed on import cargo at 2½ cents per 100 pounds per day. Free time of 5 days was allowed on import cargo, and 7 days allowed on export cargo. There is no issue presented as to the reasonableness of these periods.

When cargo was "prevented from removal by factors beyond the consignees' control such as strikes, weather conditions, or similar situations affecting the entire Port area" wharf demurrage was assessed on cargo at a reduced rate of 1 cent per 100 pounds per day.[5] All the services at the terminals operated by respondents were governed by these provisions and subsequent amendments made during the period of record.

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally a point and a place in a designated area inside the pier shed to which cargo is removed from where it has been landed under ship's hook. It is the vessel's obligation to move the cargo to the place of rest. This is accomplished by stevedoring companies performing under contract with the vessels and under the direction of the chief clerk, an employee of the vessel. The longshoremen employees of the stevedore and the clerks belong to union locals affiliated with the ILA.

On inbound shipments, the vessel sends an arrival notice to the consignee who usually receives it the morning the

[5] The terminal tariff further provided that "When removal of cargo is prevented by strike of *terminal employees* no wharf demurrage will be assessed." (Emphasis ours.)

vessel docks, but in no event later than the time the vessel finishes unloading. The notice contains the date that free time will expire. The major portion of the cargo is picked up by the consignee during free time. The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a clerk, an employee of the vessel; and while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally. The procedure is reversed but substantially similar in the case of export cargo. Wharf dumurrage is assessed against the consignee for cargo left on the pier after free time expires. In some instances, cargo in demurrage is not moved from the place of rest. In others, the terminal moves the cargo to another area of the terminal to place it in demurrage or storage.

Each of the complainants enjoys the continuous or exclusive use of an assigned pier for the berthing of its vessels. Before all the cargo unloaded from one vessel is delivered or removed from the pier, another vessel will have berthed and unloaded its cargo. This process is repeated as succeeding vessels unload. Thus, there regularly exists on the pier a mix of general cargo in different stages of discharge and delivery, some in free time and some in wharf demurrage. Because of this, complainants do not consider that their responsibility toward the cargo on their piers ends at the expiration of free time. Rather, they believe that they should use average care to see that cargo is delivered in the same condition in which it was received. Complainants employ watchmen to guard against such things as pilferage, and complainants insure the cargo while it is on their piers. Complainants consider delivery takes place when they receive a signed receipt of some kind from the party that next takes over the cargo. The record reveals

that complainants consider that when this occurs, their obligation ceases.[6]

The terminal maintains guards to police the terminals, and service employees for the upkeep and maintenance of the terminal piers and premises. Both the terminal's guards and the complainant's watchmen belong to unions not affiliated with the ILA.

In August of 1964, PBMTA received a letter from one of its members, the Massachusetts Port Authority, stating in part:

> Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times, it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

Shortly after this letter, PBMTA decided to reduce wharf demurrage to ½ cent per 100 pounds per day and to assess it against the vessel instead of the consignee. In September 1964, BSA found out about the proposal to shift the charge to the vessel and protested by telegram to PBMTA. In the next few months, two or three meetings took place, which ended with the parties still at odds. PBMTA told BSA that it would continue to assess the charge against the vessel and that if there was any complaint to file it here with the Commission. BSA's reply was that it would not pay the charge. A longshoremen's strike that had been brewing for about a month in the Port of Boston commenced on September 30, 1964. Tally clerks and other clerks of the BSA also struck. On November 18, 1964, wharf demurrage assessed against the vessel for

[6] Other common carriers in Boston whose schedules provide only an occasional call at a particular pier operate differently and discharge at the pier ends their operation there. Cargo left on the pier at the end of free time would be turned over to the terminal for storage.

cargo remaining on the pier during a strike of the vessel's employees or employees of the agent of the vessel was renamed "strike storage." On December 21, 1964, this "strike storage" charge was eliminated from the wharfage section of the tariff and set aside as a separate item. On October 1, 1964, a court injunction stayed the strike, but it began again on January 11, 1965, and lasted 33 days. During this time, truckmen and railroad men representing the consignees refused to enter the terminal and pick up cargo. All guards and watchmen remained on duty during the strike.

Pursuant to the tariff, strike storage was assessed against complainants. Upon refusal of complainants to pay the assessed charges, PBMTA brought an action in the U.S. District Court, District of Massachusetts. The Court stayed proceedings, holding that the matter was within the primary jurisdiction of the Commission. The present complaint resulted.

## DISCUSSION

### A. *Prior Approval of the Strike Storage Provision Under Section 15*

A threshold issue [7] to be disposed of before dealing with the validity of the strike storage charge under sections 16 and 17 is the question of whether the tariff revisions con-

[7] Taking the position that this is a ratemaking case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd *California v. U.S.*, 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).

taining the present strike storage rule required our approval under section 15 prior to their implementation. The Examiner found no merit in this contention of complainant and we agree.

Prior to the present rule, the tariff contained a provision providing for reduced "wharf demurrage" to be assessed against the cargo in the event removal of it was prevented by a strike. The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.

Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges, and while a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anti-competitive, monopolistic or rate-fixing scheme not contemplated in the original agreement. See *International Packers, Ltd. v. F.M.C.*, 356 F.2d 808, 810 (C.A.D.C. 1966); *Agreement No. 9025; Middle Atlantic Ports Dockage Agreement*, 8 F.M.C. 381, 384 citing *Empire State Highway Transportation Association v. Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C. 1961) c.d. 368 U.S. 931 (1961). For changes outside the scope of approved agreements and needing prior approval, see those itms listed in *The Persian Gulf Outward Freight Conf. (Agr. 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels* . . . Docket 66-27—10 FMC 61; and the discussion on the subject in *Contract*

*Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. etc.*, Docket No. 66-3, 9 FMC 431. No prior approval under section 15 was required.

B. *The Allocation of the Strike Storage Charge Under Section 17*

As "other persons subject to [the Shipping] Act"[8] terminals are required by section 17 of that Act to establish "just and reasonable regulations and practices relating to or connected with the receiving handling or storing of property." We are authorized by section 17 whenever we find a regulation or practice to be unjust or unreasonable, to prescribe a just and reasonable one.

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence the terminal operators perform some services for the carriers and other services for the shippers. *Terminal Rate Increases-Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948). A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Practices, Etc. San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd. *California v. United States*, 320 U.S. 577 (1944); *Investigation Free Time Practices-Port of San Diego*, 9 F.M.C. 525 (1966). Where the users of a particular service do not provide their share of essential terminal revenues a disproportionate share of the burden is unjustly and unrea-

[8] Section 1 provides:

"The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

sonably shifted to users of other terminal services. *Practices, Etc., San Francisco Bay Area Terminals, supra,* see also Terminal *Rate Structure-California Ports,* 3 U.S.M.C. 57 (1948). In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. *Terminal Rate Increases-Puget Sound Ports, supra.* This, of course, involves a clear delineation of the obligations of the carrier to the shipper or consignee in performing its transportation service.

Complainants' simplistic characterization of a common carrier's duty as the "duty to carry" does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a "reasonable pier." The carrier must also "tender for delivery" which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd. v. Federal Maritime Board,* 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.

In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the consignee to accept delivery. *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities *Intercoastal Rates to and from*

*Berkely*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports, supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966).

At Boston, "free time", or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents. The obligation to provide free time and effective facilities to make that free time meaningful and realistic remains the carrier's. At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper.

With the foregoing in mind, we move to a discussion of the application of the strike storage provision during the period in question. The strike storage rule clearly would apply to (1) cargo on the pier which is in free time when the strike begins; and (2) cargo which is on the pier in wharf demurrage when the strike begins.[9]

[9] The Examiner concluded that a broad reading of the rule could lead to its application to cargo the terminal had signed for and removed from the pier used by the vessel, presumably, to another pier, since strike storage is defined as a "charge assessed against cargo *on the pier* at the commencement of a strike." (Emphasis our.) We do not read the rule as applying to cargo removed from the pier by the terminal itself after it has signed for the cargo. In any event, as will appear later, an attempt to apply the rule to such cargo would, as respondents themselves appear to recognize, constitute a reasonable practice.

1. *Cargo in Free Time*

When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself. Why then should the consignee pay for the interim period of the strike? The Examiner would appear to conclude that the consignee should pay for two reasons (1) that "the terminal services rendered, that is, the supplying of the pier and the attendant services as well as the free time involved were being supplied to the cargo"; and (2) that "the reasons advanced by PBMTA for making the change [from consignee to vessel] were not valid."

That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo". While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate entity which is itself capable of paying for services rendered. The charges must always be paid by some person

standing in a prescribed relationship to the cargo.[10] Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue.[11] We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.

After reviewing respondents' past practices under the old reduced wharf demurrage provision which governed charges for storage during a strike, the Examiner concluded that the reasons advanced by respondents for shifting these charges from the consignee to the vessel were invalid. Thus, in the Examiner's view, "The terminals are arbitrarily and unfairly charging the vessel strike costs • • • for services not rendered to them." Respondents contend that the Examiner has misconceived the past practice. We find it unnecessary to resolve this dispute.

We have already concluded that the charge in question was for a service rendered the vessel in order to allow the vessel to discharge its duty to tender for delivery. Therefore, the practice is a just and reasonable one under section 17. Its validity under section 17 is not affected by re-

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[10] We can only assume that convenience alone led to the substitution of "cargo" for the term "shipper or consignee" depending *inter alia* whether the shipment was outbound or inbound.

[11] No party to this complaint case has argued that the terminal itself should absorb the cost of providing strike storage and the record here is silent as to the terminal's ability to do so.

spondents' motives. A bad motive does not make a reasonable allocation unreasonable just as a good motive does not make an unreasonable allocation reasonable. The nature of the practice itself is of course controlling.

2. *Cargo in Demurrage*

Once free time has expired, the vessel's transportation obligation has ended. Absent a special contract, the carrier has done all that its transportation obligation requires it to do. Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charges resulting from a strike occurring after free time has expired. The fact that the carrier may remain liable for loss or damage to the cargo due to its own negligence. *American President Lines* v. *F.M.B.*, 317 F. 2d 887 (C.A.D.C. 1962) in no way relieves the consignee of its duty to pick up the cargo or bear those risks attendant to a failure to do so. Thus, we conclude that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel.

C. *Application of the Strike Storage Rule as a Violation of Section 17*

The Examiner further concluded that the language of the strike storage itself rendered it inapplicable to the situation here in question. Pointing to the fact that under the rule itself, strike storage was assessable only on cargo "prevented from removal" by a strike, the Examiner found that "The refusal by consignee's employees was voluntary, and evidently was not pressed, possibly in order to avoid further complications and danger." The key to the Examiner's conclusion would seem to be his finding

that a "longshoremen's strike does not present a legal obstacle preventing the agents or employees of the consignee from picking up its cargo." [12]

To adopt the Examiner's conclusion is to place a strained and unnatural interpretation upon the language of the rule. As the Examiner himself points out, "The parties to this proceeding have been acting under the assumption that the longshoremen's strike prevented the consignee from receiving his cargo." Thus, only the Examiner has construed the language to mean "legal obstacle." Giving the language "the fair and reasonable construction required," *Thomas G. Crowe v. Southern S.S. Co.*, 1 U.S.S.B. at 147 (1929), we do not agree that the language "prevented from removal" means or was intended to mean "prevented from removal by a legal obstacle." We have long ago recognized the "physical and moral force of picket lines" and the impact of a strike which effectively prevents consignees from removing their shipments," [sic] *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).[13] When the truckers and railroad men upon whom the consignees must rely to pick up their cargo refuse to enter the terminal because of the longshoremen's strike, it can hardly be said that the consignee's "refusal" to pick up their cargo was "voluntary." We therefore conclude that the strike storage rule was applicable to the situation in issue and of itself did not constiute an unreasonable practice under section 17.

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[12] The Examiner cited section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act and certain cases dealing with "secondary boycotts" in support of this conclusion.

[13] That the *Free Time and Demurrage* case involved a trucker's strike as opposed to a longshoremen's strike is of no consequence to our conclusions here.

D. *The Assessment of Strike Storage Under Section 16 First*

There remains only the Examiner's conclusion that a violation of section 16 first had been committed. Citing only our recent decision in *Investigation of Free Time Practices—San Diego,* 9 F.M.C. 525 (1966), the Examiner concluded that the *San Diego* decision "would seem to make any undercharge or overcharge to any user, preferential or prejudicial * * *." To the Examiner, "It follows that a section 16 violation exists in the present instance since the vessel is being charged for a service to the cargo even though the cost allocation system under which the terminal operates has not been shown." The Examiner then suggests that we " * * * may wish to consider whether a distinction should be drawn between the *San Diego* case and the present one" insofar at least as *San Diego* would appear to apply to different classes of users of terminal services, *i.e.* between cargo and vessel.

The distinction to be drawn is not between the *San Diego* case and this one but between section 16 and 17.[14] The practice involved in *San Diego* was the granting of excessive free time to shippers and consignees. We discussed the validity practice under both sections 16 and 17. Under section 16, we stated that because the business practices of some shippers would not allow them to take advantage of the full free time granted, the ostensible offer to all shippers was illusory and the practice worked preference and prejudice within the meaning of section 16.[15] We further pointed out that the practice could be an unreason-

[14] The Examiner felt that "Under such circumstances, any distinction between section 16 and section 17 seems to be eliminated insofar as terminals are concerned."

[15] We also pointed out that because of the nature of the service free time or free storage, it was unnecessary to show any competitive relationship between particular shippers or consignees. See *e.g. New York Foreign Freight F. & B. Assn.* v. *F.M.C.,* 337 F. 2d 289 (1964).

able one under section 17 since by providing valuable services free or at reduced rates, the terminal was placing a disproportionate share of the burden of providing essential terminal revenues upon users of other services.

Thus, under section 16, there were two users of the same service—free time. In the present case, this ingredient is missing for the very question in issue is which of the two interests, cargo or vessel, is the actual user of the service in question. The distinction to be made is not between classes of users[16] but whether there are two interests seeking the same or substantially the same service. Here the service is for either the consignee or the vessel depending upon whether the particular cargo is in free time or demurrage. While the particular assessment of strike storage may result in an unreasonable practice under section 17, it does not in the situation at hand result in a violation of section 16.

On the basis of the foregoing, we conclude that the assessment of strike storage against the vessel for cargo on which free time has expired constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916, and respondents will be ordered to amend their strike storage rule accordingly.

By the Commission.

## ORDER

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference, and

[16] We can for example see no reason for a terminal to charge say a shipper one rate for pure storage and carrier yet another rate for such storage.

*It is ordered,* That respondents herein shall amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein.

By the Commission.

/s/ Thomas Lisi,
*Secretary*

[Seal]

10 F.M.C.

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5. *Judgment of United States Court of Appeals for the District of Columbia Circuit*

*Exhibit D* to Stipulation of Facts between plaintiffs and defendants [Appendix, Vol. I, p. 34]

*Exhibit K* to Stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix, Vol. I, p. 36]

[Filed March 18, 1968]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,305

September Term, 1967

The Boston Shipping Association, Inc., et al.,

Petitioner,

v.

Federal Maritime Commission and United States of America,

Respondents.

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Port of Boston Marine Terminal Ass'n,
Massachusetts Port Authority,
The Mystic Terminal Company,
New York Central Railroad Company,
Port Terminals, Inc.,
Wiggin Terminals, Inc.,

Intervenors.

Petition for review of an order of the
Federal Maritime Commission

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge; Leventhal, Circuit Judge

**JUDGMENT**

This cause came on to be heard on petitioners' petition for review of an order of the Federal Maritime Commission and the briefs filed by the respective parties, and the Court heard argument of counsel.

Upon consideration thereof and it appearing the petitioners' petition was not timely filed pursuant to Title 28 United States Code § 2344, it is

ORDERED AND ADJUDGED by this Court that this case is dismissed for lack of jurisdiction.

Dated: March 18, 1968. *Per Curiam*

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6. *Order of United States Court of Appeals for the District of Columbia Circuit*

*Exhibit E* to Stipulation of Facts between plaintiffs and defendants [Appendix, Vol. I, p. 34]

*Exhibit L* to Stipulation of Facts by plaintiffs, defendant and defendant-intervener [Appendix, Vol. I, p. 37]

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UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

(Title omitted in printing)

[Filed: April 25, 1968.]

Before: Bazelon, Chief Judge: Fahy, Senior Circuit Judge; and Leventhal, Circuit Judge, in Chambers.

**ORDER**

On consideration of petitioners' petition for rehearing, it is ORDERED by the Court that petitioners' aforesaid petition is denied.

*Per Curiam.*

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7. *Petition for Reconsideration by Federal Maritime Commission*

*Exhibit F* to Stipulation of Facts between plaintiffs and defendants [Appendix, Vol. I, p. 34]

*Exhibit M* to Stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix, Vol. I, p. 37]

Before the

FEDERAL MARITIME COMMISSION

THE BOSTON SHIPPING ASSOCIATION, INC., et. al.,
Complainants,

v. Docket No. 66-28

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, et al.,
Respondents.

## PETITION OF SWEDISH TRANSATLANTIC LINE * FOR RECONSIDERATION

Swedish Transatlantic Line hereby petitions this Commission to reconsider its decision in Docket 66-28 insofar as that decision held that an agreement among the members of the respondent Port of Boston Marine Terminal Association to assess strike storage charges against carriers serving the Port of Boston did not require approval under Section 15 of the Shipping Act, 1916. Reconsideration of this holding is requested because of the Supreme Court's subsequent decision in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261 (1968).

1. Swedish Transatlantic Line is a common carrier by water in foreign commerce which operates vessels to and from the Port of Boston. It is represented in Boston by its Agent, Furness, Withy & Co. Furness, Withy is a member of the Boston Shipping Association, Inc. (hereafter, the Shipping Association) which, with its member lines, filed the complaint in this proceeding.

2. The complaint charged that certain tariff provisions of the Port of Boston Marine Terminal Association, Inc. (hereafter "Marine Terminals"), and association of terminal operators, were in violation of Sections 15, 16, and 17 of the Shipping Act, 1916. Prior to the filing of the complaint, Marine Terminals had brought suit against Shipping Association and its member lines in the U.S. District Court for the District of Massachusetts for collection of charges under the disputed tariff provisions. The District Court stayed proceedings, holding that the suit raised issues within the primary jurisdiction of this Commission.

* A Swedish corporation whose registered name is Rederiaktiebolaget Transatlantic.

Pursuant to such stay, the Shipping Association filed this complaint.

3. The Commission held in this proceeding that, except for one provision,[1] the tariff items in dispute did not violate Sections 15, 16, and 17 of the Shipping Act.

Although the Commission's decision was served June 28, 1967, no further action has been taken in the district court since that case was stayed. Thus there is no court judgment respecting the sums claimed by Marine Terminals from Furness, Withy as agent of petitioner under the disputed tariff provisions, and these sums have not been paid.

4. The facts relevant to this Petition for Reconsideration are set forth in the Commission's report, and are as follows:

(a) Marine Terminals operates under Agreement 8785, approved by this Commission (9 S.R.R. at 288);
(b) Effective July 1, 1962, Marine Terminals issued a "terminal tariff";[2] this tariff provided a special rate for wharf demurrage when cargo could not be removed because of strikes. Under such "tariff", the demurrage charge was assessed *on the cargo* (9 S.R.R. at 288);
(c) Some time after August, 1964 and before November, 1964, the tariff was changed to provide that wharf demurrage would be assessed *against the vessel*, not the cargo. This change was protested by the Shipping

[1] That provision involved the assessment against the vessel of charges against cargo subject to demurrage when the strike begins, an assessment which the Commission found in violation of Section 17 of the Act.

[2] Such a tariff, of course, did not and does not have the force of law. It was filed with the Commission pursuant to a condition in Marine Terminals' approved agreement which required Marine Terminals to file its rates and regulations with the Commission.

Association, which never agreed to it. On November 18, 1964, this wharf demurrage charge was renamed a "strike storage" charge (9 S.R.R. at 290-91);

(d) A longshoremen's strike commenced on January 11, 1965 and lasted 33 days. Marine Terminals attempted to assess its strike storage charge against the member lines of the Shipping Association, who refused to pay. Marine Terminals then brought the suit referred to above (9 S.R.R. at 291).

5. One of the issues raised in this case was whether the agreement shifting liability from the cargo to the vessel was a new agreement among the members of Marine Terminals which required separate § 15 approval. The Commission held that it did not require such approval because "the authority granted under [Agreement 8785] to jointly fix charges carried with it the continued authority to properly allocate those charges, . . . . " (9 S.R.R. at 291-92).

6. When the Commission issued its report on this case, the Supreme Court had just granted a writ of *certiorari* in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, to review the Court of Appeals' decision which had affirmed this Commission's decision in FMC Docket No. 1089, *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corporation*, 6 S.R.R. 685 (1965). On March 6, 1968, the Supreme Court issued its decision in *Volkswagenwerk*. That decision reversed the Court of Appeals and this Commission, and, in so doing, interpreted § 15 as requiring approval of agreements which this Commission had previously held did not require approval. The agreement involved in this case falls into that category, and the Commission's decision that the agreement did not re-

quire § 15 approval is contrary to and in conflict with the principles set forth in the *Volkswagenwerk* case.

7. In *Volkswagenwerk*, steamship carriers agreed on a method for assessing charges against themselves to finance a fund for longshoremen. The carriers involved belonged to the Pacific Maritime Association, an employer organization which negotiated contracts with labor unions. In one such labor contract, the Association agreed to create the fund; the agreement as to the method of assessment, however, was not part of the contract with the union. The Supreme Court held that the agreement allocating liability for contributions to the fund required § 15 approval, *whether or not either (a) the agreement creating the Association, or (b) the Association's agreement with the unions required such approval.* The Supreme Court said:

> "But the agreement with which we deal here—levying $29,000,000 over five years, binding all principal carriers, stevedoring contractors, and terminal operators on the Pacific Coast, and necessarily resulting in substantially increased stevedoring and terminal charges—was neither *de minimis* nor routine. We hold that this agreement was required to be filed under § 15 of the Act.
>
> "It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with collective agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15." (88 S. Ct. at 938).

8. It is certainly true that in this case, the agreement creating Marine Terminals, Agreement No. 8785, did require approval and was approved. It is likewise true that Agreement 8785 authorized the members to agree upon rates and charges. But Agreement 8785 did not authorize the parties to the agreement to shift wharf demurrage charges, historically and always a charge against the cargo, to a charge against the vessel. Indeed, Agreement 8785 did not empower the parties to create *any* liability of the vessel for "storage". Thus:

(a) The agreement provides:

> "THIRD: This agreement shall cover the following subject matters and all services, facilities, rates, and charges incidental thereto:— wharfage, dockage, free time, *wharf demurrage,* usage charges, passenger charges, water, electricity." (Emphasis supplied).

Pursuant to that agreement, and as set forth above, Marine Terminals published a "Tariff" establishing rates for "wharf demurrage", *as a charge against the cargo.*

(b) Very early decisions of the Commission's predecessor agencies established that wharf demurrage is a charge as against the cargo. *Storage of Import Property,* 1 U.S.M.C. 676-678 (1937); *Practices of San Francisco Bay Terminals,* 2 U.S.M.C. 588, 603, 609 (1941), aff'd., sub nom., *California v. United States,* 320 U.S. 577 (1944); *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21, 24-25 (1948); *Terminal Rate Structure—California Ports,* 3 U.S.M.C. 57, 58, 60, 78 (1948); *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 109 (1948). *Terminal*

*Rate Structure—California Ports, supra,* developed the well-known "Freas Formula"—a formula for allocating terminal costs as between cargo and vessel. All wharf demurrage costs were allocated to the cargo (3 U.S.M.C. at 78). The Freas Formula continues to be applied by this Commission, *e.g., Wharfage Charges on Bulk Grain—Pacific Ports,* 7 S.R.R. 353 (1965); *Pacific Northwest Tidewater Elevator Association,* 9 S.R.R. 427 (1967). The Commission has never held that wharf demurrage charges may be assessed against the carrier. On the contrary, the Commission said in *Terminal Rate Structure—Pacific Northwest Ports,* 5 F.M.B. 53, 59 (1956):

> "Under tackle to tackle rates, terminals may not assess charges against carriers for services performed or facility usage incurred prior to delivery within reach of ship's tackle or subsequent to delivery at the end of ship's tackle."

And in *Wharfage Charges on Bulk Grain—Pacific Ports, supra,* the Commission said (at 358):

> "Wharfage by definition is a charge against cargo for the use of terminal facilities."

Finally, this Commission's General Order 15 defines wharf demurrage as:

> "A charge assessed *against cargo* remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage." (46 C.F.R. 533.6(d)(4); emphasis supplied).

(c) It is against this background that the members of Marine Terminals agreed to shift liability for "Wharf demurrage", accruing during longshoremen's strikes, from

the cargo interest to the vessel interest, and effectuated that agreement by a publication in their tariff. The members apparently realized the "striking" change they had effected in the historical allocation of terminal charges, for they sought to minimize that effect by renaming those wharf demurrage charges "strike storage charges", although their organizing agreement did not empower them to assess strike storage charges.

(d) Under the principles laid down in the *Volkswagenwerk* case, an agreement allocating liability is a different agreement from an agreement empowering an association to create liability. Thus whether or not the agreement authorizing an association to create liability requires approval *or* stands approved, the agreement allocating liability requires separate approval. The agreement in this case allowing Marine Terminals to create liability for wharf demurrage was Agreement 8785. Such liability is historically, and was under Marine Terminals' initial tariff, allocated 100% to the cargo and 0% to the vessel. The further agreement among the members of Marine Terminals to shift liability for wharf demurrage had the effect of reallocating liability from 100% to 0% as against the cargo and from 0% to 100% as against the vessel. A more radical reallocation could not have been achieved. The disparity between this agreement and the authorizing agreement is underscored by the fact that the shift in liability from cargo to vessel stands in derogation of every germane precedent —each of which explicitly places liability for demurrage on cargo rather than carrier. The Commission *must* have understood wharf demurrage as a cargo liability when it approved Agreement 8785 authorizing the parties thereto to fix rates and charges for wharf demurrage. It is thus clear that approval of Agreement 8785 provided no cover of authority for the allocation of wharf demurrage (under

whatever name) to carriers. Such allocation was first effectuated by the disputed tariff of Marine Terminals. Since that tariff constituted an allocation not previously approved, it fell squarely within the principle subsequently announced in *Volkswagenwerk,* and cannot lawfully be effectuated unless approval is conferred.

9. The Commission's Rules, 46 C.F.R. § 502.264 allow the filing of a petition for reconsideration within 30 days after service of the order except for "good cause". Since the basis of this petition is the *Volkswagenwerk* decision, and that decision was not rendered until nine months after the Commission's decision herein, this petition could not have been filed within 30 days. The timing of this petition does not prejudice the respondents, who have taken no action in the U. S. District Court on the subject matter of these proceedings since the Commission's decision was issued.

For these reasons, petitioner respectfully requests this Commission to reopen Docket 66-28, and to reconsider its decision insofar as that decision held that the agreement respecting "strike storage" charges did not constitute a separate agreement for which § 15 approval was required.

Respectfully submitted,
/s/ Amy Scupi
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Swedish Transatlantic Line

September 4, 1968

[Certificate of Service]

8. *Letter from Thomas Lisi, Secretary, Federal Maritime Commission, to Mrs. Amy Scupi, dated October 8, 1968*

*Exhibit G* to Stipulation of Facts between plaintiffs and defendants [Appendix, Vol. I, p. 35]

*Exhibit N* to Stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix, Vol. I, p. 37]

October 8, 1968

Mrs. Amy Scupi
Galland, Kharasch, Calkins & Lippman
1824 R. Street, N. W.
Washington, D. C. 20009

Dear Mrs. Scupi:

At the direction of the Federal Maritime Commission, I am returning herewith your petition for reconsideration of the Commission's decision in Docket 66-28, filed on behalf of Swedish Transatlantic Line.

Inasmuch as the petition was not filed within the period specified in the Commission's Rules of Practice and Procedure, it is time barred.

Very truly yours,
/s/ Thomas Lisi
Secretary

Enclosure

---

9. *Balances on Strike Storage Charges*

*Exhibit O* to Stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix, Vol. I, p. 37]

Current balances on strike storage charges:

| | | |
|---|---|---|
| Mystic Terminal Co. | American Export Line, Inc. | $ 404.23 |
| | Furness, Withy & Co. | 8,765.01 |
| | Moran Shipping Agencies, Inc. | 860.89 |
| New York Central R.R. Co. | United States Lines | 2,985.20 |
| | Farrell Lines | 1,550.40 |
| Port Terminals, Inc. | J. F. Moran & Co. | 1,158.63 |
| Wiggin Terminals, Inc. | Norton, Lilly & Co. | 1,943.04 |
| Mass. Port Authority | Boston Shipping | 806.45 |
| | American President Lines | 1,222.16 |

10. *Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Tariff No. 4 (Designated excerpts)*

*Exhibit P* to stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix Vol. I, p. 38]

"Balticwest" Tariff No. 4 — First revised page 1
Cancels Original page 1

• • • "Balticwest" Tariff No. 3

**SCANDINAVIA BALTIC/U.S. NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE**

**Agreement No. 9364**

Members:

Finnlines

Moore-McCormack Lines

Swedish American Line

Swedish Transantlantic Line

Thorden Lines

[Cancelled February 23, 1965]

**TARIFF NO. 4**

Naming rates and conditions for westbound cargo from regular Swedish ports of loading either direct or transshipments to US North Atlantic ports

This Tariff is governed, except as otherwise provided herein, by Bill of Lading Tariff FMC No. 1.

**RULES AND REGULATIONS**

* * * * *

Application of rates

* * * * *

e) The rates in this Tariff are port to port rates as customary and unless otherwise specifically stated do not include terminal or any other charges that are for the account of the owner of the cargo.

11. *Swedish Lines Bill of Lading (designated excerpts)*

*Exhibits Q* to Stipulation of Facts by plaintiffs, defendants and defendant-intervener [Appendix, Vol. I, p. 38]

SWEDISH LINES BILL OF LADING Page 2

SWEDISH AMERICAN LINE B/L
Gothenburg, Sweden Reference No.

SWEDISH TRANSATLANTIC LINE
Gothenburg, Sweden

U.S. NORTH ATLANTIC SERVICE

* * * * *

In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations, exceptions and conditions, on both pages, whether written, printed, stamped or otherwise incorporated as fully as if they were all signed by the Merchant.

* * * * *

3. PERIOD OF RESPONSIBILITY. Goods in the custody of the Carrier or his Agents or servants before

loading and after discharge, whether being forwarde
or from the vessel or whether awaiting shipment, la
or stored, or put into bulk or craft belonging to the Ca
or not, or pending transshipment at any stage of the w
transport, are in such custody at the sole risk and exp
of the Merchant and thus the Carrier has no responsib
whatsoever for the goods, prior to the loading on and
sequent to the discharge from the vessel.

However, in case the contract evidenced by this Bil
Lading is subject to the U.S. Carriage of Goods by Sea
then the provisions stated in said Act shall govern bef
loading and after discharge and throughout the entire t
the goods are in the Carrier's custody.

* * * * *

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# Supreme Court of the United States.

OCTOBER TERM, 1969.

No.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL.,

*Petitioners,*

*v.*

REDERIAKTIEBOLAGET TRANSATLANTIC,*

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the case on January 8, 1970 (A. vol. II, 15).

*The original defendants in this action were the Boston Shipping Association and thirteen corporations and partnerships representing shipping interests in the Port of Boston. The Association and all thirteen of its co-defendants accepted the order of the District Court (A. 150-151). Only the respondent here, a defendant-intervenor below, claimed an appeal to the Circuit Court (A. 151). As to the original defendants, the matter is moot.

## Citations to Opinions Below.

The opinion of the Federal Maritime Commission (A. vol. I, 65-79) printed in Appendix B attached to this petition, pp. 409-420 (offset), is reported in 10 F.M.C. 409 (1967). The opinion of the District Court (A. vol. I, 147-150), printed in Appendix B, pp. 33-36, is unreported. The opinion of the Court of Appeals (A. vol. II, 9-11) printed in Appendix B, pp. 1-6 (offset), is reported in F. 2d (1st Cir. 1970).

## Jurisdiction.

The judgment of the Court of Appeals was entered on January 8, 1970 (A. vol. II, 15; Appendix B, p. 6). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1964).

## Questions Presented.

1. Where the Commission has determined that a change in incidence of certain charges under an FMC-approved agreement was not a modification of such agreement requiring further section 15 approval, whether such determination may be collaterally attacked in judicial proceedings and not on review of the Commission record.

2. Where there is power to fix terminal tariff charges under an agreement already approved by the Federal Maritime Commission under section 15 of the Shipping Act, whether a change in the incidence of charges, as to who is obligated to pay, is a modification requiring further section 15 approval.

## Statutes Involved.

The statutory provisions involved are section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. § 814 (1964), and 28 U.S.C. §§ 2341-2344 (Supp. III, 1964). They are printed in Appendix A, attached hereto, pp. 15-19.

## Statement of the Case.

The action was originally brought in the Superior Court of the Commonwealth of Massachusetts in and for Suffolk County in 1965 with reference to a provision in the tariff of the plaintiffs, hereinafter called "Terminals," providing storage charges for cargo located on the Boston piers during longshoremen's strikes (A. vol. I, 1-4). The defendants, The Boston Shipping Association and thirteen other corporations and partnerships, will be hereinafter called, collectively, "Shipping."

The case was removed to the District Court by Shipping on September 1, 1965 (A. vol. I, 6-7, 27).

*The jurisdiction of the District Court was invoked under 28 U.S.C. § 1441 (b) (1964), relative to actions in which a claim is alleged under the laws of the United States* (A. vol. I, 6).

Among other defenses, Shipping denied in its answer that the tariff rates were legally or properly in force and further affirmatively alleged that Terminals had failed to comply with the Shipping Act (A. vol. I, 8-9).

On March 11, 1966, the District Court, at the suggestion of Terminals, entered an order (A. vol. I, 24) that the Federal Maritime Commission had initial and primary jurisdiction to determine the lawfulness and reasonableness of the practice under the item providing for the charge and that the proceeding in the Court should be stayed to allow Shipping a further opportunity to apply for and obtain the Commission's determination or ruling.

Shipping thereafter filed a complaint, bearing the docket number in the Federal Maritime Commission of 66-28, challenging the lawfulness and reasonableness of the charges in question (A. vol. I, 25).

On June 28, 1967, the Commission issued its final report and order. *Boston Shipping Association, Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967) (A. vol. I, 65-79; Appendix B, pp. 409-420).

As the Commission found, Terminals operate under F.M.C.-approved Agreement No. 8785, Article Third of which authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate changes, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission. (Pp. 410-411, *infra.*)

When cargo is on the Boston piers during longshoremen's and steamship clerks' strikes it cannot be picked up by consignees because of picket lines, and in 1964 Terminals decided to reduce the charge for wharf demurrage during such strikes to ½ cent per 100 pounds per day and to assess it as strike storage against the vessel rather than the consignee. The tariff at issue containing this change was filed with the Commission pursuant to Agreement No. 8785 (*infra*, pp. 412-413).

Briefly stated, the Commission held that assessment of strike storage charges for cargo on the Boston piers during longshoremen's strikes is subject to the jurisdiction of the Commission; that under Agreement No. 8785 a change in the tariff, shifting the charge from the cargo interests to the vessel, did not require prior approval by the Commission under section 15 of the Act; and that the assessment of such charge against the vessel for cargo which was still in free time (that is, five days following discharge

from the vessel) at the commencement of a strike does not constitute an unjust and unreasonable practice under section 17 of the Act or an undue or unreasonable prejudice under section 16 of the Act.

On August 15, 1967 (A. vol. I, 28), the District Court granted a motion of Shipping to amend the order of March 11, 1966, by adding a new paragraph 5 as follows: "All normal rights of appeal from any decision of the Federal Maritime Commission are reserved to the parties under the applicable statutes and decisions." (A. vol. I, 25.)

On September 19, 1967, Shipping filed a petition for review of the Commission's order in the Court of Appeals for the District of Columbia Circuit (A. vol. I, 31, 58). By a judgment dated March 18, 1968, that Court of Appeals dismissed the petition for lateness (A. vol. I, 31, 58, 80).

Swedish Transatlantic Line, the present intervenor, on or about September 4, 1968, filed a petition with the Federal Maritime Commission for reconsideration because of the decision of this Court on March 6, 1968, in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (1968), hereinafter called the "*VW* case" (A. vol. I, 81-87). Swedish Transatlantic alleged that it had theretofore been represented by Furness, Withy & Co., Ltd., a member of the Boston Shipping Association and a party to the F.M.C. proceedings (A. vol. I, 81). The Commission returned the petition because it was not filed within the period specified in the Commission's rules (A. vol. I, 88). No judicial review was sought by Swedish Transatlantic of this action.

On April 16, 1969 (A. vol. I, 29), Swedish Transatlantic was allowed to intervene in the proceedings before the District Court. In the answer which Swedish Transatlantic then filed (A. vol. I, 13-16), it asserted *inter alia* that the Commission's decision had misinterpreted section 15, was

"advisory" only, and was in conflict with the *VW* case (A. vol. I, 15).

On April 29, 1969, the District Court, per Charles E. Wyzanski, Jr., C.J., having before it stipulations of the facts, ruled:

> "The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.
>
> "Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute." (A. vol. I, 149-150; Appendix B, pp. 35-36.)

From this decision Swedish Transatlantic alone claimed an appeal (A. vol. I, 151). On the appeal, the Court of Appeals for the First Circuit, per Bailey Aldrich, C.J., reversed the District Court, held that the Commission's decision was erroneous, and ordered judgment entered for Transatlantic (A. vol. II, 9-15; Appendix B, p. 6). On the issue of section 15, the Court said that "In the light of the strictures expressed in *VW*," the Commission's "holding seems unsupportable" (A. vol. II, 13; Appendix B, p. 5). The Court reviewed the language of this Court in

the *VW* case, which had pointed to the "expansive language" of section 15 and the Commission's "extremely narrow view" in that case. 390 U.S. 261, 272-273. The Court of Appeals stated that exceptions existed in *de minimis* or routine situations to be defined in "appropriate administrative proceedings," and then said:

> "Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found '*de minimis* or routine.' Administrative standards cannot be established ex post facto. *Cf. NLRB* v. *Wyman-Gordon Co.*, 1969, 394 U.S. 759; 5 U.S.C. § 553." ( A. vol. II, 13; Appendix B, p. 5.)

In footnote 4 (*ibid.*) the Court noted its belief that the "Commission's prior view, that all rate changes under such an agreement are without section 15, *Empire State Highway Transp. Ass'n, Inc.* v. *American Export Lines, Inc.*, 1959, 5 F.M.B. 565, *affirmed, Empire State Highway Transp. Ass'n, Inc.* v. *Federal Maritime Board*, D.C. Cir., 2961, 291 F.2d 336, *cert. denied* 368 U.S. 931, fell with the overruling of the Commission in *VW, supra.*"

## Argument.

I. The Court below was Not Sitting as a Reviewing Court with Reference to the Commission. By Allowing Collateral Attack on the Commission's Decision, the Court below so Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for Exercise of this Court's Power of Supervision.

The opinion below gave short shrift to the Commission's determination in 10 F.M.C. 409 even though no appeal was taken from that determination.

As the District Court held (A. vol. I, 149; Appendix B, *infra*, p. 35), the Commission had primary jurisdiction. Swedish Transatlantic, the respondent here, was represented throughout the Commission proceedings by counsel for Furness, Withy & Co., Ltd. Neither it nor Furness, Withy exhausted the administrative remedies available. See the provisions for intervention in 5(1) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72, and the judicial review procedure set forth in 28 U.S.C. §§ 2341-2344 (Supp. III, 1964).

Not only did the Court of Appeals permit a collateral attack on the Commission's ruling, but it also gave the Commission's ruling even less weight than it should have had on direct review. The question whether a change in tariff under a section 15 agreement is a "modification" of the agreement needing further approval is one of degree. *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime Board*, 291 F. 2d 336, 339 (D.C. Cir. 1961), cert. denied 368 U.S. 931. See *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 339 (D.C. Cir. 1967):

> "A Commission determination that the conference action falls within or without the approved agreement must be given due deference by a reviewing court. See Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)."

If that is so for a reviewing Court of Appeals under the Hobbs Act, it obviously would be worse for a District Court, which does not sit in review of the Commission's determinations, to undermine what was done in the agency proceedings.

II. THE ISSUE DECIDED BELOW, THAT A CHANGE IN INCIDENCE OF TERMINAL TARIFF CHARGES PROMULGATED UNDER AN APPROVED F.M.C. AGREEMENT, CONSTITUTES A "MODIFICATION" OF THE APPROVED AGREEMENT WHICH MUST ITSELF BE APPROVED, IS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The substantive issue is important because so much of the maritime business in the United States is done by the use of tariffs issued under FMC-approved agreements. In a consistent line of cases there have been important tariff changes adopted under such agreements which have been held not to be "modifications" requiring separate section 15 approval. The same view has generally prevailed since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927).

In *Empire State Highway Transportation Association, Inc.* v. *American Export Lines*, 5 F.M.B. 565 (1959), for example, it was argued that the issuance of Tariffs Nos. 3 and 4 under a section 15 agreement among the pier operators in the Port of New York constituted new agreements or modifications thereof which required specific approval under section 15 before being made effective. The nature of the changes in *Empire State* was extensive and not merely limited to the level of rates. In fact, the complainants' argument was that Tariffs Nos. 3 and 4 "not only set forth the rates and charges, but define the nature of the terminals' obligations, adopt rules with respect to their liability, describe the conditions under which others might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded" (5 F.M.B. at 585). The Board held:

> "We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The

issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement." (5 F.M.B. at 585).

In *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime Board,* 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931, in holding on a petition for review that the Federal Maritime Board correctly ruled that tariff increases and changes in regulations embodied in a Tariff No. 5 did not constitute a new section 15 agreement or modification under Agreement No. 8005, the Court approved the language quoted above from 5 F.M.B., observing (291 F. 2d at 339):

> "Thousands of rate changes have been agreed upon in concert by conference members in the maritime and related industries under the authority of approved conference agreements, and we are cited to no instance in which conventional rate changes have been held by Board or court to be unlawful because unaccompanied by prior Board approval."

The matter was discussed again in *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965), where the examiner had concluded that, despite the Commission's having approved the terminals' conference agreement, which authorized discussion of and agreement on rates, charges and practices, the fruits of these discussions would have to be filed with and approved by the Commission under section 15. The Commission overruled the examiner and stated:

> "Since Agreement 9025 does not itself impose any charges, it is impossible on this record to assess its effect on carriers, ports, and the commerce of the

United States with any real degree of accuracy. The Commission's power over section 15 agreements, however, consists not only of initial approval, but of continuing supervision; and if at some time in the future, rates, charges, classifications, rules, or regulations are established pursuant to the agreement which violate the fair and reasonable standards of the Act the Commission may protect the public interest by withdrawing its approval of the basic agreement itself or by requiring its modification." (8 F.M.C. at 386.)

We believe and assert that port terminal operators' conferences in the United States have generally tried to operate on these principles in reliance upon the Commission's rulings. The section 15 agreement never shows what the charges will be, nor does it show who will be assessed the charges. The Commission has plenty of power to correct any abuses in tariffs either on its own initiative (tariffs must be filed with the Commission) or by complaint.

If this generally prevailing view of the law is wrong, which the present petitioners doubt, this Court should so declare. The present situation is one of serious confusion between what the Commission has required traditionally as against the opinion of the Court of Appeals in an area of enormous importance to the commercial and maritime interests involved.

III. The Court's Decision below Conflicts in Principle with Empire State Highway Transportation Ass'n, Inc. v. Federal Maritime Board, 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931, as Well as with Administrative Practice of the F.M.C.

The District of Columbia Circuit Court of Appeals in the *Empire State* case noted that there were many tariff

changes under approved agreements. As the Federal Maritime Board argued in its brief in that case, quoted with approval by the Court, 291 F. 2d at 339, "'A tariff change and modification of the basic agreement may sometimes be a matter of degree.'"

The conflict between *Empire State* and the opinion below is a genuine one, even though *Empire State* itself largely involved a rate level change rather than a change of incidence. In *Empire State* the tariff, as we note *supra*, p. 9, contained many rules and regulations. The Court quoted from the Commission's report as follows:

> "'We do not separately consider the regulations and practices, for if, as we hold, the rate increase is valid the same reasoning carries with it the validity of these particular regulations and practices.'" (291 F. 2d at 338, footnote 2.)

## IV. The Court below Misconstrued Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968), by Applying that Decision to a Case where the Tariff Item had been Adopted under an Approved F.M.C. Agreement.

The *VW* case was the basis of the First Circuit's opinion herein. We submit that the case was misapplied by the Court below.

In footnote 26 in *VW*, 390 U.S. at 277, this Court stated with apparent endorsement that

> "Prior to this 1966 amendment, the Commission had taken some steps to protect itself from *de minimis* filings. In *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927), the Commission held 'routine' intraconference changes and transactions not subject to § 15."

Nothing whatever in the *VW* case suggests that this Court intended there to overrule the whole line of Commission authorities beginning with *Section 15 Inquiry, supra*. On the contrary, there was no section 15 agreement in *VW*, and the agreement there was not even an intraconference change. The facts and the *ratio decidendi* of *VW* are entirely consistent with the Commission's *Boston Shipping* decision herein.

If the Commission had to approve every tariff change of incidence or new item adopted under an already approved section 15 agreement, it would mean approving at least the first tariff issued under the agreement and all changes of incidence or new regulations adopted thereafter. This is so because the conference agreement itself does not show to whom charges will be made or what regulations will be adopted. The Commission's practice is to receive such tariffs for filing. It has full power to entertain complaints or commence investigations if any practices in the tariffs are unreasonable and indeed to withdraw its initial approval of the basic agreement. Disposition of such complaints and investigations is an important part of the Commission's function under the Shipping Act.

Contrary to what the First Circuit rules, see A. vol. II, 13; Appendix B, p. 5, the "routine" matters referred to in *VW*, 390 U.S. at 276, have indeed been determined by the Commission "after appropriate administrative proceedings." The Commission's action in approving Agreement No. 8785 was an administrative proceeding, and its holdings in cases from *Section 15 Inquiry, supra*, through *Boston Shipping Association* v. *Port of Boston*, 11 F.M.C. 1 (1967), constitute such proceedings. It is difficult to perceive how the Commission could have proceeded otherwise,

and petitioners submit that *VW* was not intended by this Court to compel the Commission to revise so significant a part of its administrative functions.

## Conclusion.

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

JOHN M. REED,
ROBERT J. MULDOON, JR.,
WITHINGTON, CROSS, PARK & GRODEN,
Attorneys for petitioners other than
Massachusetts Port Authority,
NEIL L. LYNCH,
GEORGE W. STUART,
Attorneys for Massachusetts
Port Authority.

## Appendix A.

### 46 U.S.C. § 814.

§ 814. *Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.*

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character or freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the

detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a

change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. (As amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88-275, 78 Stat. 148.)

§2341. *Definitions.*

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§2342. *Jurisdiction of court of appeals.*

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2343. *Venue.*

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2344. *Review of orders; time; notice; contents of petition; service.*

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

## Appendix B.

# FEDERAL MARITIME COMMISSION

## No. 66-28

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.

*v.*

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.

*Decided June 23, 1967*

Assessment of "strike storage" charges for cargo remaining on premises of terminal during longshoremen's strike is subject to the jurisdiction of the Commission as a practice within the meaning of section 17 of the Shipping Act, 1916.

A change in the terminal tariff rule governing the assessment of "strike storage" which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916, where rule is contained in a tariff filed with the Commission under an existing approved section 15 agreement; such change constituting neither a modification to the already approved basic agreement nor a new agreement within the meaning of section 15.

The assessment of the "strike storage" against the vessel for cargo still in "free time" when the strike begins does not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

While the assessment by a terminal of a charge against the vessel for services rendered to the cargo for benefit of the consignee raises issues under section 17 as to the justness and reasonableness of the allocation it does not constitute an undue or unreasonable prejudice under section 16 since the cargo and vessel are not users of the same service.

Cargo of the consignees was "prevented from removal" within the meaning of the strike storage provision of respondents' tariff by the longshoremen's strike and the application of that provision for the period in question did not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

*Leo F. Glynn, Esq.*, attorney for the complainants.

*John M. Reed, Esq.*, attorney for respondents other than Massachusetts Port Authority.

*George W. Stuart, Esq.* and *Neil L. Lynch, Esq.*, attorneys for Massachusetts Port Authority.

*Donald J. Brunner, Esq.* and *Samuel B. Nemirow, Esq.*, Hearing Counsel.



292-412—68

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*):*

This proceeding arises out of a complaint filed April 21, 1966, by the Boston Shipping Association. Hearings were held before Examiner Benjamin A. Theeman who issued his decision February 17, 1967. Oral argument was held May 11, 1967. The complainant, the Boston Shipping Association, Inc., is a nonprofit Massachusetts corporation, whose members are ocean steamship companies, their agents, or stevedores, while the respondent (PBMTA) is an association of "other persons" subject to the Shipping Act, 1916, each of which owns or operates a marine terminal in connection with a common carrier by water. The complainant alleges that respondent has violated section 15 of the Act by putting certain tariff modifications into effect without first securing the approval of the Commission, and sections 16 and 17 of the Act by unjustly assessing against the vessel the charge for so-called "strike storage" of cargo during strikes of the vessel employees instead of assessing it to the cargo as had previously been the practice. The Examiner found violations of sections 16 and 17, but not section 15. Respondent and intervenor hearing counsel have taken exception to the Initial Decision and complainant has replied. Our conclusions differ somewhat from those of the Examiner.

### FACTS

Respondent PBMTA operates under approved Agreement No. 8785, Article Third of which provides that the agreement authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate charges, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission.

Pursuant to Agreement No. 8785, PMBTA issued Terminal Tariff No. 1, effective July 1, 1962. This tariff provided, among other things, for wharfage,[1] wharf demurrage,[2] dockage,[3] and free time.[4] It con-

*Commissioner Fanseen did not participate.

[1] The term "wharfage refers to the charge assessed against all cargo passing or conveyed over, onto or under wharves or between vessels or overside vessels when berthed at pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

[2] The term "wharf demurrage refers to the charge assessed against cargo remaining on a pier or wharf after the expiration of free time."

tained no provision specifically dealing with strike storage. Under the tariff as originally filed, dockage was assessed against the vessel on general cargo at 20 cents a ton; wharf demurrage was assessed on import cargo at 2½ cents per 100 pounds per day. Free time of 5 days was allowed on import cargo, and 7 days allowed on export cargo. There is no issue presented as to the reasonableness of these periods.

When cargo was "prevented from removal by factors beyond the consignees' control such as strikes, weather conditions, or similar situations affecting the entire Port area" wharf demurage was assessed on cargo at a reduced rate of 1 cent per 100 pounds per day.[3] All the services at the terminals operated by respondents were governed by these provisions and subsequent amendments made during the period of record.

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally a point and place in a designated area inside the pier shed to which cargo is removed from where it has been landed under ship's hook. It is the vessel's obligation to move the cargo to the place of rest. This is accomplished by stevedoring companies performing under contract with the vessels and under the direction of the chief clerk, an employee of the vessel. The longshoremen employees of the stevedore and the clerks belong to union locals affiliated with the ILA.

On inbound shipments, the vessel sends an arrival notice to the consignee who usually receives it the morning the vessel docks, but in no event later than the time the vessel finishes unloading. The notice contains the date that free time will expire. The major portion of the cargo is picked up by the consignee during free time. The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a clerk, an employee of the vessel; and while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally. The procedure is reversed but substantially similar in the case of export cargo. Wharf demurrage is assessed against the consignee for cargo left on the pier after free time expires. In some instances, cargo in demurrage is not moved from the place of rest. In others, the terminal moves the cargo to another area of the terminal to place it in demurrage or storage.

[1] The term "dockage refers to the charge assessed for the service of providing space alongside of wharf, pier or seawall structure for the docking or berthing of watercraft, or for the mooring thereof, or other watercraft docked."

[2] The term "free time refers to the period which cargo is allowed to remain on a pier free of charge, immediately prior to loading of the vessel or subsequent to its discharge from a vessel."

[3] The terminal tariff further provided that "When removal of cargo is prevented by strike of terminal employees no wharf demurrage will be assessed." (Emphasis ours).

Each of the complainants enjoys the continuous or exclusive use of an assigned pier for the berthing of its vessels. Before all the cargo unloaded from one vessel is delivered or removed from the pier, another vessel will have berthed and unloaded its cargo. This process is repeated as succeeding vessels unload. Thus, there regularly exists on the pier a mix of general cargo in different stages of discharge and delivery, some in free time and some in wharf demurrage. Because of this, complainants do not consider that their responsibility toward the cargo on their piers ends at the expiration of free time. Rather, they believe that they should use average care to see that cargo is delivered in the same condition in which it was received. Complainants employ watchmen to guard against such things as pilferage, and complainants insure the cargo while it is on their piers. Complainants consider delivery takes place when they receive a signed receipt of some kind from the party that next takes over the cargo. The record reveals that complainants consider that when this occurs, their obligation ceases.[6]

The terminal maintains guards to police the terminals, and service employees for the upkeep and maintenance of the terminal piers and premises. Both the terminal's guards and the complainant's watchmen belong to unions not affiliated with the ILA.

In August of 1964, PBMTA received a letter from one of its members, the Massachusetts Port Authority, stating in part:

> Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times, it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

Shortly after this letter, PBMTA decided to reduce wharf demurrage to ½ cent per 100 pounds per day and to assess it against the vessel instead of the consignee. In September 1964, BSA found out about the proposal to shift the charge to the vessel and protested by telegram to PBMTA. In the next few months, two or three meetings took place, which ended with the parties still at odds. PBMTA told BSA that it would continue to assess the charge against the vessel and that if there was any complaint to file it here with the Commission. BSA's reply was that it would not pay the charge. A longshoremen's strike that had been brewing for about a month in the Port of Boston commenced on September 30, 1964. Tally clerks and other clerks of the

[6] Other common carriers in Boston whose schedules provide only an occasional call at a particular pier operate differently and discharge at the pier ends their operation there. Cargo left on the pier at the end of free time would be turned over to the terminal for storage.

BSA also struck. On November 18, 1964, wharf demurrage assessed against the vessel for cargo remaining on the pier during a strike of the vessel's employees or employees of the agent of the vessel was renamed "strike storage." On December 21, 1964, this "strike storage" charge was eliminated from the wharfage section of the tariff and set aside as a separate item. On October 1, 1964, a court injunction stayed the strike, but it began again on January 11, 1965, and lasted 33 days. During this time, truckmen and railroad men representing the consignees refused to enter the terminal and pick up cargo. All guards and watchmen remained on duty during the strike.

Pursuant to the tariff, strike storage was assessed against complainants. Upon refusal of complainants to pay the assessed charges, PBMTA brought an action in the U.S. District Court, District of Massachusetts. The Court stayed proceedings, holding that the matter was within the primary jurisdiction of the Commission. The present complaint resulted.

## DISCUSSION

### A. *Prior Approval of the Strike Storage Provision Under Section 15*

A threshold issue [7] to be disposed of before dealing with the validity of the strike storage charge under sections 16 and 17 is the question of whether the tariff revisions containing the present strike storage rule required our approval under section 15 prior to their implementation. The Examiner found no merit in this contention of complainant and we agree.

Prior to the present rule, the tariff contained a provision providing for reduced "wharf demurrage" to be assessed against the cargo in the event removal of it was prevented by a strike. The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.

Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges,

[7] Taking the position that this is a ratemaking case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd *California* v. *U.S.*, 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).

and while a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anticompetitive, monopolistic or rate-fixing scheme not contemplated in the original agreement. See *International Packers, Ltd.* v. *F.M.C.*, 356 F. 2d 808, 810 (C.A.D.C. 1966); *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement*, 8 F.M.C. 381, 384 citing *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C. 1961) c.d. 368 U.S. 931 (1961). For changes outside the scope of approved agreements and needing prior approval, see those items listed in *The Persian Gulf Outward Freight Conf. (Agr. 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels* . . . Docket 66–27—10 FMC 61; and the discussion on the subject in *Contract Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. etc.*, Docket No. 66–3, 9 FMC 431. No prior approval under section 15 was required.

B. *The Allocation of the Strike Storage Charge Under Section 17*

As "other persons subject to [the Shipping] Act"[3] terminals are required by section 17 of that Act to establish "just and reasonable regulations and practices relating to or connected with the receiving handling or storing of property". We are authorized by section 17 whenever we find a regulation or practice to be unjust or unreasonable, to prescribe a just and reasonable one.

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence the terminal operators perform some services for the carriers and other services for the shippers. *Terminal Rate Increases-Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948). A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Practices, Etc. San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd. *California* v. *United States*, 320 U.S. 577 (1944); *Investigation Free Time Practices-Port of San Diego*, 9 F.M.C. 525 (1966). Where the users of a particular service do not provide their share of essential

[3] Section 1 provides:
"The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services. *Practices, Etc. San Francisco Bay Area Terminals, supra*, see also Terminal *Rate Structure-California Ports*, 3 U.S.M.C. 57 (1948). In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. *Terminal Rate Increases-Puget Sound Ports, supra*. This, of course, involves a clear delineation of the obligations of the carrier to the shipper or consignee in performing its transportation service.

Complainants' simplistic characterization of a common carrier's duty as the "duty to carry" does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a "reasonable pier." The carrier must also "tender for delivery" which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.

In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the consignee to accept delivery. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities *Intercoastal Rates to and from Berkeley*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports, supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practices—Port of San Diego*, 9 F.M.C. 325 (1966).

At Boston, "free time", or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents. The obligation to provide free time and effective facilities to make that free time

meaningful and realistic remains the carrier's. At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper.

With the foregoing in mind, we move to a discussion of the application of the strike storage provision during the period in question. The strike storage rule clearly would apply to (1) cargo on the pier which is in free time when the strike begins; and (2) cargo which is on the pier in wharf demurrage when the strike begins.[9]

1. *Cargo in Free Time*

When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself. Why then should the consignee pay for the interim period of the strike? The Examiner would appear to conclude that the consignee should pay for two reasons (1) that "the terminal services rendered, that is, the supplying of the pier and the attendant services as well as the free time involved were being supplied to the cargo"; and (2) that "the reasons advanced by PBMTA for making the change [from consignee to vessel] were not valid".

That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo". While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate

[9] The Examiner concluded that a broad reading of the rule could lead to its application to cargo the terminal had signed for and removed from the pier used by the vessel, presumably, to another pier, since strike storage is defined as a "charge assessed against cargo on *the pier* at the commencement of a strike." (Emphasis ours). We do not read the rule as applying to cargo removed from the pier by the terminal itself after it has signed for the cargo. In any event, as will appear later, an attempt to apply the rule to such cargo would, as respondents themselves appear to recognize, constitute a reasonable practice.

entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo.[10] Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue.[11] We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.

After reviewing respondents' past practices under the old reduced wharf demurrage provision which governed charges for storage during a strike, the Examiner concluded that the reasons advanced by respondents for shifting these charges from the consignee to the vessel were invalid. Thus, in the Examiner's view, "The terminals are arbitrarily and unfairly charging the vessel strike costs * * * for services not rendered to them." Respondents contend that the Examiner has misconceived the past practice. We find it unnecessary to resolve this dispute.

We have already concluded that the charge in question was for a service rendered the vessel in order to allow the vessel to discharge its duty to tender for delivery. Therefore, the practice is a just and reasonable one under section 17. Its validity under section 17 is not affected by respondents' motives. A bad motive does not make a reasonable allocation unreasonable just as a good motive does not make an unreasonable allocation reasonable. The nature of the practice itself is of course controlling.

2. *Cargo in Demurrage*

Once free time has expired, the vessel's transporation obligation has ended. Absent a special contract, the carrier has done all that its transportation obligation requires it to do. Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear

[10] We can only assume that convenience alone led to the substitution of "cargo" for the term "shipper or consignee" depending *inter alia* whether the shipment was outbound or inbound.

[11] No party to this complaint case has argued that the terminal itself should absorb the cost of providing strike storage and the record here is silent as to the terminal's ability to do so.

the risk of any additional charges resulting from a strike occurring after free time has expired. The fact that the carrier may remain liable for loss or damage to the cargo due to its own negligence, *American President Lines* v. *F.M.B.*, 317 F. 2d 887 (C.A.D.C. 1962) in no way relieves the consignee of its duty to pick up the cargo or bear those risks incidant to a failure to do so. Thus, we conclude that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel.

C. *Application of the Strike Storage Rule as a Violation of Section 17*

The Examiner further concluded that the language of the strike storage itself rendered it inapplicable to the situation here in question. Pointing to the fact that under the rule itself, strike storage was assessable only on cargo "prevented from removal" by a strike, the Examiner found that "The refusal by consignee's employees was voluntary, and evidently was not pressed, possibly in order to avoid further complications and danger." The key to the Examiner's conclusion would seem to be his finding that a "longshoremen's strike does not present a legal obstacle preventing the agents or employees of the consignee from picking up its cargo." [12]

To adopt the Examiner's conclusion is to place a strained and unnatural interpretation upon the language of the rule. As the Examiner himself points out, "The parties to this proceeding have been acting under the assumption that the longshoremen's strike prevented the consignee from receiving his cargo." Thus, only the Examiner has construed the language to mean "legal obstacle." Giving the language "the fair and reasonable construction required," *Thomas G. Crowe* v. *Southern S.S. Co.*, 1 U.S.S.B. at 147 (1929), we do not agree that the language "prevented from removal" means or was intended to mean "prevented from removal by a legal obstacle." We have long ago recognized the "physical and moral force of picket lines" and the impact of a strike which effectively prevents consignees from removing their shipments," *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).[13] When the truckers and railroad men upon whom the consignees must rely to pick up their cargo refuse to enter the terminal because of the longshoremen's strike, it can hardly be said that the consignee's "refusal" to pick up their cargo was "voluntary." We

[12] The Examiner cited section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act and certain cases dealing with "secondary boycotts" in support of this conclusion.

[13] That the *Free Time and Demurrage* case involved a trucker's strike as opposed to a longshoremen's strike is of no consequence to our conclusions here.

therefore conclude that the strike storage rule was applicable to the situation in issue and of itself did not constitute an unreasonable practice under section 17.

D. *The Assessment of Strike Storage Under Section 16 First*

There remains only the Examiner's conclusion that a violation of section 16 first had been committed. Citing only our recent decision in *Investigation of Free Time Practices—San Diego*, 9 F.M.C. 525 (1966), the Examiner concluded that the *San Diego* decision "would seem to make any undercharge or overcharge to any user, preferential or prejudicial * * * ." To the Examiner, "It follows that a section 16 violation exists in the present instance since the vessel is being charged for a service to the cargo even though the cost allocation system under which the terminal operates has not been shown." The Examiner then suggests that we "* * * may wish to consider whether a distinction should be drawn between the *San Diego* case and the present one" insofar at least as *San Diego* would appear to apply to different classes of users of terminal services, i.e. between cargo and vessel.

The distinction to be drawn is not between the *San Diego* case and this one but between section 16 and section 17.[14] The practice involved in *San Diego* was the granting of excessive free time to shippers and consignees. We discussed the validity practice under both sections 16 and 17. Under section 16, we stated that because the business practices of some shippers would not allow them to take advantage of the full free time granted, the obstensible offer to all shippers was illusory and the practice worked preference and prejudice within the meaning of section 16.[15] We further pointed out that the practice could be an unreasonable one under section 17 since by providing valuable services free or at reduced rates, the terminal was placing a disproportionate share of the burden of providing essential terminal revenues upon users of other services.

Thus, under section 16, there were two users of the same service—free time. In the present case, this ingredient is missing for the very question in issue is which of the two interests, cargo or vessel, is the actual user of the service in question. The distinction to be made is not between classes of users [16] but whether there are two interests seeking

[14] The Examiner felt that "Under such circumstances, any distinction between section 16 and section 17 seems to be eliminated insofar as terminals are concerned."

[15] We also pointed out that because of the nature of the service free time or free storage, it was unnecessary to show any competitive relationship between particular shippers or consignees. See e.g. *New York Foreign Freight F. & B. Assn. v. F.M.C.*, 337 F. 2d 289 (1964).

[16] We can for example see no reason for a terminal to charge say a shipper one rate for pure storage and carrier yet another rate for such storage.

the same or substantially the same service. Here the service is for either the consignee or the vessel depending upon whether the particular cargo is in free time or demurrage. While the particular assessment of strike storage may result in an unreasonable practice under section 17, it does not in the situation at hand result in a violation of section 16.

On the basis of the foregoing, we conclude that the assessment of strike storage against the vessel for cargo on which free time has expired constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916, and respondents will be ordered to amend their strike storage rule accordingly.

By the Commission.

ORDER

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference, and

*It is ordered*, That respondents herein shall amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*



U.S. GOVERNMENT PRINTING OFFICE: 1968

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,
Plaintiffs

*v.*

Civil Action
No. 65-640-W

BOSTON SHIPPING ASSOCIATION, INC., ET AL
Defendants

REDERIAKTIEBOLAGET TRANSATLANTIC,
Defendant-Intervener

OPINION
April 29, 1969

WYZANSKI, Chief Judge

This action was originally brought in the Superior Court of the Commonwealth of Massachusetts for declaratory relief and an order for payment, both referring to a provision in plaintiffs' tariff providing storage charges for cargo located in Boston during longshoremen's strike.

Pursuant to 28 U.S.C. Sec. 1441 b, defendants petitioned for removal of the action to this Court on the ground that the "claim" sued upon is one "arising under the . . . laws of the United States."

The complaint, called a petition under state practice, alleges that Port of Boston Marine Terminal Association (PBMTA) is an association existing under Federal Maritime Commission Agreement No. 8785, that the members furnish wharfage, dock, and other terminal facilities in connection with common carriers by water, and that the applicable tariff is filed with the Maritime Commission. The tariff is said to have been adopted under Section 15 of the Shipping Act, 1916. Relief sought was (1) a declaration that under item 15 of Section III of the tariff, Boston

Shipping Association and other defendants are obliged to pay strike charges as they accrue, and (2) an order for payment of charges already accrued during a 1965 dock strike.

At an early stage this Court held that the case is one within this Court's jurisdiction under 28 U.S.C. Sec. 1441 b. See *Wells Fargo & Co.* v. *Cuneo,* 241 Fed. 726 (S.D.N.Y.); *McGoon* v. *Northern Pacific Ry. Co.,* 204 Fed. 998 (D.N.D.); Hart & Wechsler, *The Federal Courts and the Federal System,* pp. 727-733, 744-747, 749-752, 763-769, 774-777. Plaintiffs' claim, in this Court's view, involves the construction of the Shipping Act and the result depends on the determination of a controversy as to its scope. Cf. *Shulthis* v. *McDougal,* 225 U.S. 561, 569. The claim arises under Agreement No. 8785, which was approved by a federal government agency, the Federal Maritime Commission, and requires consideration of that Commission's rulings. The claim involves, potentially at least, the primary jurisdiction of the Commission. Thus the right of the complainants will be sustained if the laws of the United States and the rules and actions of a federal agency are given one construction and will be defeated if they are given another. See *Bell* v. *Hood,* 327 U.S. 678.

Having determined it had jurisdiction of this case, this Court on March 11, 1966 entered an order that the Federal Maritime Commission had primary jurisdiction to determine the lawfulness and reasonableness of the contested practice under item 11 of Section III; and that proceedings in this Court should be stayed pending administrative action.

April 21, 1966 defendant presented to the Federal Maritime Commission a challenge to the lawfulness and reasonableness of the questioned charges. After hearing by an examiner, the Commission issued its final report and

order under the title *Boston Shipping Association Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967). Therein the F.M.C. held that assessment of strike storage charges for cargo on the Boston piers during longshoremen's strikes is subject to the Commission's jurisdiction under Section 17 of the Shipping Act, 1916; that a change in the tariff, shifting the charge from the cargo interests to the vessel, did not require prior approval by the Commission under Section 15 of the Act; and that the assessment of the charge against the vessel for cargo which was still in free time (that is, five days following discharge from the vessel) at the commencement of the strike does not constitute an unjust and unreasonable practice under Section 17 of the Act or an undue or unreasonable prejudice under Section 16 of the Act.

No timely appeal was taken from the Commission's order to the Court of Appeals for the District of Columbia.

Swedish Transatlantic Line, which has intervened in this court, on September 4, 1968 filed with the F.M.C. a petition for reconsideration. The F.M.C. dismissed. Swedish Transatlantic sought no review in the District of Columbia.

Thereafter in this court plaintiffs and defendants entered into one stipulation, and plaintiffs, defendants, and the intervenor entered into another. This Court approved both stipulations. No one wished to offer additional evidence.

On the basis of the stipulations, and in the light of what has been recited, this Court summarily concludes as follows.

The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.

Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

There is no merit to the intervenor's various contentions. It will suffice to deal with one, in addition to those already answered. The F.M.C.'s report cannot be regarded as merely advisory. It was a definite decision. And it was a correct one. There is nothing to be gained by this Court traversing once more the ground so satisfactorily covered by the Commission itself, and open to inspection by anyone who cares to read the publications of the Commission.

*Plaintiffs shall prepare an appropriate form for declaratory judgment and order, and shall serve on all parties by May 5, 1969.*

CHARLES E. WYZANSKI, JR.
Chief Judge

# United States Court of Appeals
## For the First Circuit

No. 7368.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,

PLAINTIFFS, APPELLEES,

*v.*

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,

DEFENDANTS,

REDERI AKTIEBOLAGET TRANSATLANTIC,

DEFENDANT-INTERVENOR, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*,
and MCENTEE, *Circuit Judge*.

*George F. Galland*, with whom *Stephen Moulton*, *Amy Scupi*, *David Stitt*, *Moulton, Looney, Mazzone, Falk & Markham* and *Galland, Kharasch, Calkins & Lippman* were on brief, for appellant.

*John M. Reed*, with whom *Neil L. Lynch*, *George W. Stuart*, and *Withington, Cross, Park & Groden* were on brief, for appellees.

January 8, 1970.

ALDRICH, *Chief Judge*. The members of the Port of Boston Marine Terminal Association (Terminals), operate pursuant to Federal Maritime Commission Agreement No. 8785, a conference arrangement approved by the Commission under section 15 of the Shipping Act. 46 U.S.C. § 814. Approval permits uniform rates for all "services, facilities, rates, and charges incidental thereto:—wharf-

* By designation.

age, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity." The tariffs so established were first filed with the Commission in 1962. Wharf demurrage was therein defined as a storage charge "levied against cargo remaining on a pier or wharf after the expiration of free time." On imported cargo "free time" was the first five days after unloading, an arbitrary period to permit consignees sufficient access to the cargo to satisfy the carrier's obligation to make delivery. If delivery was not taken within the free time, the charge, by accruing against the cargo, became the consignee's obligation.

If access to cargo was prevented by a strike, the demurrage rate was substantially reduced, but it remained as a charge against unloaded cargo. This led to complaints by consignees. By December 1964, through a series of amendments, Terminals changed the tariff to provide that if the consignee's access was prevented by a strike of longshoremen or other agents of the ship, as distinguished from employees of Terminals, the reduced demurrage would be called "strike storage" and charged to the vessel instead of to the cargo. This charge was expressed in broad terms, and resulted in shifting the obligation to the vessel even if the strike did not commence until after the expiration of the free time. The new tariff purported to be immediately effective, and hence was imposed without approval by the Commission.

Appellant Rederiaktiebolaget Transatlantic (Swedish) is a common carrier serving the Port of Boston. On January 8, 9, and 10, 1965, its vessel MATTAWUNGA unloaded cargo in Boston at Mystic Terminals. On January 11 there was a general longshoremen's strike. Longshoremen are employees of the stevedoring concerns which serve all vessels. Tally clerks, who are also agents of the vessel, correspondingly struck. Accordingly there could be no

completed delivery of cargo to consignees who had not called before January 11. Non-delivery was additionally assured because transportation employees serving consignees observe picket lines. Under the 1964 amendments Terminals charged the resultant demurrage to the various vessels. MATTAWUNGA's bill was $8,154. Swedish denied the obligation. Other carriers similarly situated took the same position.

Thereafter Terminals brought an action in the Massachusetts Superior Court for declaratory relief and for payment against Boston Shipping Association (Shipping), representing various vessel owners and agents. Shipping removed the case to the district court. At the suggestion of Terminals the district court ruled that the Commission had primary jurisdiction and entered a stay permitting Shipping to proceed there. Shipping did so, and lost. *Boston Shipping Ass'n, Inc.* v. *Port of Boston Marine Terminal Ass'n*, 1967, 10 F.M.C. 409, hereinafter *Boston Shipping*. It then appealed to the D.C. Court of Appeals, but the appeal was dismissed for late filing. Subsequently Swedish, which was not a member of Shipping, sought to appear before the Commission and to petition for reconsideration.[1] The petition was refused docketing because of lateness. Swedish then sought to intervene as a defendant in the district court proceedings, and that motion was allowed. Upon intervening, Swedish filed an answer raising defenses on the merits. On stipulations of fact the court, without jury, found against all defendants, including Swedish. Swedish, only, appeals.

The first question must concern the jurisdiction of the district court. There is no diversity jurisdiction as to Swedish, for lack of the jurisdictional amount, 28 U.S.C.

[1] Swedish asserted a conflict with *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 1968, 390 U.S. 261, hereinafter *VW*, a case which postdated the *Boston Shipping* decision.

§ 1332. We see no basis for aggregation of the claims against the several defendants. *Cf. Snyder* v. *Harris*, 1969, 394 U.S. 332; *Pinel* v. *Pinel*, 1916, 240 U.S. 594, 596; *Troy Bank* v. *G. A. Whitehead & Co.*, 1911, 222 U.S. 39, 40-41. If this were a suit under a tariff, jurisdiction would automatically attach under 28 U.S.C. § 1337, where the amount involved is of no consequence. *Peyton* v. *Railway Express Agency, Inc.*, 1942, 316 U.S. 350; *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 1926, 271 U.S. 259, 261. Terminals' tariff was not, however, a tariff in the sense of being within 46 U.S.C. § 817, and was filed with the Commission only as a condition imposed by the prior approval of the conference agreement.[2] We nevertheless find a sufficient federal issue. While it is commonly held that the question must appear on the face of the complaint, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 1950, 339 U.S. 667; *Louisville & Nashville R.R.* v. *Mottley*, 1908, 211 U.S. 149, the necessity for construing a federal statute may appear by inference. *Cf. Peyton* v. *Railway Express Agency, Inc.*, *supra*. It is true that the complaint did not allege that the change in the agreement had not been approved by the Commission, but neither did it allege approval. Hence we conclude, albeit with some hesitation, that the necessity of approval was raised, and that it sufficiently appeared that a question of construction of the Shipping Act was presented. This is enough to satisfy section 1337.

We turn to this question forthwith, as it constitutes Swedish's most significant defense. Section 15 requires that "modifications," as well as the original agreement, receive the prior approval of the Commission. In *Boston*

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[2] General filing requirements for marine terminal tariffs were added by the Commission's General Order 15, 46 C.F.R. §§ 533.1 *et seq.*, which became effective on October 5, 1965, and hence does not apply here.

*Shipping* the Commission, without any discussion of the broad language of the act, held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring section 15 filing and approval. In the light of the strictures expressed in *FW*, *supra*, n. 1, this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in *FW* pointed to the "expansive language" of section 15,[3] and the Commission's "extremely narrow view," and specifically rejected the binding effect of the Commission's administrative construction. 390 U.S. 261, 272-73. Then, referring to the statute's "literal provisions," the Court spoke of possible exceptions only in terms of a "*de minimis* or routine character," and stated that even these must be defined by "appropriate administrative proceedings" 390 U.S. 261, 276.

Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found "*de minimis* or routine." Administrative standards cannot be established ex post facto. *Cf. NLRB* v. *Wyman-Gordon Co.*, 1969, 394 U.S. 759; 5 U.S.C. § 553.

We may add, for good measure, that a change in incidence, as distinguished from a change in rate,[4] seems to

[3] The statute requires the filing of "every agreement . . . or modification . . . thereof . . . fixing or regulating transportation rates or fares . . . ." It then provides that the Commission shall approve or disapprove, upon terms stated, and that "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation . . . ." *See also* n. 4, *infra*.

[4] The Commission's prior view, that all rate changes under such an agreement are without section 15, *Empire State Highway Transp. Ass'n, Inc.* v. *American Export Lines, Inc.*, 1959, 5 F.M.B. 565, *affirmed, Empire State Highway Transp. Ass'n, Inc.* v. *Federal Mari-*

us anything but routine. Even less routine is an unjustifiable change. The Commission expressly found this one "unjust and unreasonable" to the extent that demurrage was to be charged to the vessel even if the strike did not commence until after the expiration of free time, when the vessel's obligation to make the goods available had been fully performed. 10 F.M.C. at 417-18. It would peculiarly violate section 15's "expansive language" to hold that an unreasonable modification could be rewritten nunc pro tunc and saved in part.[5]

We need consider only one other matter, the question of the binding effect of the *Boston Shipping* decision even though erroneous. We are not concerned with the parties to the proceeding, as they did not join in the present appeal. Nor is the question whether the decision was an appropriate approval—to the extent that it was an approval—of demurrage charges incurred after its date. We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. *See Columbia Broadcasting System, Inc.* v. *United States*, 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise § 18.05. Any other conclusion would destroy the statutory requirement.

*Reversed; judgment for the intervening defendant.*

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*time Board*, D.C. Cir., 1961, 291 F.2d 336, *cert. denied* 368 U.S. 931, fell with the overruling of the Commission in *Pan W*, *supra*. Some changes in rates and charges are now expressly allowable without approval under the 1961 amendment of section 15. This portion is quoted in *Pan W*, *supra*, 390 U.S. at 269-70, n. 16. The Commission did not rely upon that provision, nor do appellees herein.

[5] *See* n. 3, *supra*.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1251

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PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL
Petitioners,

v.

REDERIAKTIEBOLAGET TRANSATLANTIC
Respondent.

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On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent opposes the petition for a writ of certiorari. The Court below has not departed from the "accepted and usual course of judicial proceedings;" its judgment does not conflict with any decision in another circuit; and the case presents no issue of public importance which was not settled in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968)—hereinafter, *VW*—on which rests the decision of which petitioners seek review.

## COUNTERSTATEMENT OF THE CASE

We accept petitioners' statement except that:

(a) The Commission-approved agreement among the several Boston terminals did not authorize "the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, *and all terminal facilities and services*" (Petition, 4; our italics). It covered only–

> " . . . the following subject matters and all services, facilities, rates and charges *incidental thereto*:– wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity." (App., Vol. I, 61; our italics.)

(b) Petitioners incorrectly assert that their agreement does not show "who will be assessed the charges." (Petition, 11.) The charges in dispute cover "wharf demurrage" –a term uniformly and repeatedly defined by the Commission as a "charge against cargo" (App. Vol. I, 85), and similarly defined by the terminals in every edition of their tariff (App. Vol. I, 107, 108, 130, 131, 132, 133). Even when the same charge was renamed "strike storage," it was defined as a charge "against cargo" (App. Vol. I, 109).

When a provision was eventually added to provide that "strike storage . . . will be assessed to the vessel" (App. Vol. I, 135), the addition reversed the meaning of the agreement as the Commission had approved it. An approved agreement for assessing against cargo an industry-fixed price for a service to the cargo became an unapproved agreement for assessing against *carriers* the same industry-fixed price for the same service to cargo. Such changes have uniformly been held by the Commission and the courts to require §15 approval. *American Export Isbrandtsen Lines v. Federal Maritime Commission*, 334 F.2d 185 (9th Cir., 1964); *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335 (D.C. Cir., 1967); *Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association*, 183 F.Supp. 910 (E.D. Pa., 1960).

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S *VW* DECISION.

This Court held in *VW* that an agreement among persons subject to the Shipping Act having the effect of allocating or reallocating liability required Commission approval under § 15 of the Act, 46 U.S.C. § 814 (Petition, 15). The Court rejected in *VW* the contention advanced by the terminals here that such a re-allocation was exempt from approval as "routine" or "de minimis" (390 U.S. at 277-78). The Court below could not have ruled otherwise in this case without flouting the *VW* mandate. The District Court had succeeded in reaching a contrary result only by ignoring *VW* (App. Vol. I, 147-150).

We see no conflict between the decision below and that of the District of Columbia Circuit in *Empire State Highway Transportation Ass'n., Inc. v. Federal Maritime Board*, 291 F.2d 336 (1961), cert. denied 368 U.S. 931. *Empire State* involved an ordinary rate increase of a type long held "routine" and therefore covered by the Commission's approval of general rate-making activity. The case did not hold that permission for industry-wide fixing of prices payable by one class of customers authorized transfer of the charges thus fixed to another class. In any event, *Empire State* can have no relevance here. The Court of Appeals followed this Court's 1968 decision in *VW*, which differs from *Empire State* as the terminals read it. We assume that a 1968 decision of this Court commands precedence over a conflicting 1961 decision of any other court.

### II. THE DECISION HERE USURPS NO POWER VESTED IN THE MARITIME COMMISSION.

The terminals contend (Petition, 7-8) that the judgment below constitutes a collateral (and forbidden) attack on a Commission decision which could be reviewed only on direct petition to a court of appeals under 28 U.S.C. § 2341-44—the Judicial Review Act. The contention is unfounded:

(a) As the Court of Appeals noted, the respondent (Transatlantic) was not a party to the Commission proceedings.

(b) Participation in the Commission case by Transatlantic's agent, Furness Withy, does not change matters. Transatlantic was admitted to intervention before the District Court because Furness Withy lacked substantial incentive to protect, and had in fact insufficiently protected Transatlantic's interest (App. Vol. I, 12-13).

(c) The Commission's decision (App. Vol. I, 65-79) was not a "final order" of the type committed to the exclusive reviewing jurisdiction of courts of appeals by 28 U.S.C. § 2342. The District Court in the present case permitted the *defendants* in that court to seek a Commission ruling on the "lawfulness and reasonableness" of demurrage charges for which the terminals were suing (App. Vol. I, 24). The defendants, as complainants before the Commission, requested such a ruling (App. Vol. I, 66). The Commission held (App. Vol. I, 70-72) that the charges were not unlawful or unreasonable. The ruling resulted in no determination of or exoneration from liability; it merely purported to state the Commission's view on two issues out of a larger number tendered in the District Court (App. Vol. I, 15). The Commission did not purport to decide —and could not decide—such other issues.

A Commission order is final only if it "imposes an obligation, denies a right, or fixes some legal relationship which may cause irreparable injury." *Lee v. Federal Maritime Board*, 284 F.2d 577, 580 (9th Cir., 1960). The order in question had none of these consequences.

## III. THE DECISION BELOW LACKS SIGNIFICANT REGULATORY CONSEQUENCES.

The terminals (Petition, 9) claim to see an important issue in the question whether "a change in incidence" of a charge under an approved price-fixing agreement requires a new agreement and new approval. That question was answered in *VW*.

If the terminals wish in the future to assess carriers rather than cargo for wharf demurrage (under whatever name), they can easily test their right to do so by amending their agreement and asking the Commission to approve the amendment. The Court below held merely that the Commission's decision "did not bind non-parties to charges sought to be imposed for services rendered prior thereto."

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1251

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL., PETITIONERS

*v.*

REDERIAKTIEBOLAGET TRANSATLANTIC

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION AS AMICI CURIAE

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### QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission's determination of the validity of a conference tariff amendment, on reference from a district court entertaining private litigation, may be attacked collaterally in the district court action rather than in accordance with the exclusive direct review procedures provided by the Administrative Orders Review Act.

2. If such collateral attack is not improper, whether the Commission properly determined that a tariff amendment shifting the incidence of certain storage

charges from cargo to vessel was within the scope of the conference agreement previously approved by the Commission and therefore did not require specific prior approval.

INTEREST OF THE UNITED STATES AND THE COMMISSION

The decision below that a Federal Maritime Commission determination may be attacked otherwise than pursuant to the statutory direct review procedures seriously interferes with the purposes of the Shipping Act and the Administrative Orders Review Act. It would permit Commission orders to be attacked long after the time for direct review has run, thus impairing their finality, and further would permit them to be attacked in private litigation where neither the Commission or the United States would necessarily be a party or even have official notice of the attack. Since this decision raises serious questions concerning the procedures for judicial review of orders of the Commission and other agencies, we submit this memorandum, pursuant to Rule 42(4) of this Court's Rules, to support the petition for a writ of certiorari.

Furthermore, even if collateral review were proper, we believe that the court below has erroneously decided an important substantive question under the Shipping Act. The decision that Commission approval of a conference agreement does not authorize the conference members to make conventional tariff changes without specific prior approval would undermine the Commission's longstanding position and would seriously affect the administration of the Act. Thus, we believe

that this substantive question would warrant this Court's consideration if it were properly presented here.

## STATEMENT

The Port of Boston Marine Terminal Association (Terminals) is a conference of marine terminal operators which operates pursuant to an agreement (No. 8785) approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 46 U.S.C. 814. The agreement authorizes the operators to act together in setting rates and charges for the furnishing of marine terminal facilities and services, including wharfage, dockage, free time and wharf demurrage.[1]

Terminals, on behalf of its members filed a tariff of rates and charges with the Commission, as required by the agreement. This tariff originally provided that, in the event of a longshoremen's strike, the cargo owner would pay a diminished charge for cargo remaining on the piers during the strike. In 1964, Terminals revised the tariff so as to shift the incidence of such charge from the cargo to the vessel. When a strike occurred in 1965 and several vessels refused to pay the charge, Terminals brought an action for declaratory relief and payment against Boston Shipping Association (Shipping), an organization representing various

[1] "Wharfage" is a charge for use of the piers by shippers and consignees and is assessed against all cargo going across the pier. "Dockage" is a charge assessed against the vessel for space alongside the pier. "Free time" is a period of time during which cargo is permitted to remain on the pier free of charge, immediately prior to being loaded on the vessel or immediately after discharge from the vessel. "Wharf demurrage" is a charge usually assessed against cargo which remains on the pier after the expiration of free time (Pet. App. B, 410–411, n. 1–4).

vessel owners and operators. The district court (to which the action was removed from the State court where it had been begun) referred the issues concerning the lawfulness of the tariff amendment raised by Shipping to the Commission, under the doctrine of primary jurisdiction, and stayed its proceedings until the Commission should decide the matter.

Shipping thereupon filed a complaint with the Commission. After full evidentiary hearing, the Commission on June 28, 1967, issued a report and order (Pet. App. B, 409–420) sustaining the validity of Terminals' tariff amendment under the Shipping Act in all respects here relevant. It held that the amendment shifting the strike storage charge from the cargo to the vessel was within the scope of Terminals' basic agreement already approved by the Commission (No. 8785, *supra*) and so did not require additional prior approval by the Commission as a new agreement or modification under Section 15 of the Shipping Act (Pet. App. B, 413–414). The Commission further held that it is not an unreasonable practice, within the meaning of Section 17 of the Shipping Act (15 U.S.C. 816), for such charge to be assessed against the vessel for cargo which, when the strike begins, is still in free time (*i.e.*, has been on the dock less than five days after discharge from the vessel (*id.* at 414–417)).[2]

[2] The Commission also ruled, however, that it is an unreasonable practice to access such charge against the vessel for cargo which, when the strike begins, is no longer in free time (*id.* at 417–418). This aspect of the Commission's decision was not in issue in the district court litigation, since the relevant cargo was still in free time when the strike began.

On September 19, 1967, more than three weeks after expiration of the sixty-day time limit specified in the Administrative Orders Review Act (28 U.S.C. 2341, *et seq.*, Pet. 18–19), Shipping filed a petition for review of the Commission's order in the Court of Appeals for the District of Columbia Circuit. The petition was dismissed as untimely.

On September 4, 1968, the respondent here, Rederiaktiebolaget Transatlantic (Swedish), a carrier against which strike storage charges had been assessed, petitioned the Commission for reconsideration of its decision, claiming that it was inconsistent with this Court's decision on March 6, 1968 in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261. Swedish claimed to have been represented in the Commission proceedings.[3] The petition was returned as untimely under the Commission's Rules of Practice and Procedure, and Swedish sought no review of this action. On April 16, 1969, the district court granted Swedish's motion to intervene as a defendant in the resumed district court proceedings.

The district court thereafter rendered judgment against all the defendants. After noting that the defendants had not sought timely direct review of the Commission's order and that Swedish had sought no

[3] Swedish's petition for reconsideration stated that "It is represented in Boston by its Agent, Furness, Withy & Co." and that "Furness, Withy is a member of * * * Shipping * * * which, with its member lines, filed the complaint in this proceeding [*i.e.*, the proceeding before the Commission]." (R. Vol. I, 81, par. #1). The petition further stated that Terminals claims the sums "from Furness, Withy as agent of petitioner under the disputed tariff provisions." (*Id.*, at 82, par. #3).

review of the Commission's denial of its petition for reconsideration (Pet. App. B, 35), Judge Wyzanski ruled as follows (*id.*, at 35–36):

> The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals for the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.
>
> Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

Swedish alone of the defendants appealed, and the court below reversed. Reasoning that *Volkswagenwerk, supra,* had undermined the basis of the Commission's decision, the Court of Appeals for the First Circuit, per Chief Judge Aldrich, held that Terminals' tariff amendment was invalid because it was a "modification"' of a Section 15 agreement and had not received the Commission's specific prior approval (Pet. App. B, 4–5). The court further held that Swedish was not bound by the Commission's decision because it had not been a party to the proceedings before the Commis-

sion (*id.*, at 6). The court therefore directed that judgment be entered for Swedish (*ibid.*). Terminals filed its petition for writ of certiorari on February 27, 1970.

## ARGUMENT

1. By allowing what amounts to a collateral attack on a Commission order in the district court, the court below has improperly extended the jurisdiction of the district courts in a manner inconsistent with the exclusive review provisions of the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.* Since this conclusion is in conflict with a decision of the Court of Appeals for the Second Circuit and affects orders of a number of other agencies, we believe it warrants review by this Court.

*a.* The Commission's orders deciding the validity of Terminals' tariff amendment and denying Swedish's petition for reconsideration determined "right[s] or obligations[s]" so that "legal consequences" flowed therefrom. They were therefore reviewable final orders. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 602; *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131, 132, 143. "Such review 'is equally available whether [the Commission's] * * * proceeding follows referral by a court or originates with the Commission.'" *Atlantic Coast Line, supra*, 383 U.S. at 602; *Pennsylvania R. Co., supra*, 363 U.S. at 205; *El Dorado Oil Works* v. *United States*, 328 U.S. 12. The exclusive method provided by Congress for attacking the validity of the Commission's orders is, as we show more

fully below, the filing of a petition for review in a court of appeals pursuant to the procedures established in the Administrative Orders Review Act.

Section 31 of the Shipping Act (46 U.S.C. 830) states that "except as otherwise provided" the "venue and procedure" governing suits to "enforce, suspend, or set aside, in whole or in part, any order of the [Commission]" shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission.[4] This statutory incorporation of the procedures for district court review under the Urgent Deficiencies Act (38 Stat. 208) was superseded, however, by the Administrative Orders Review Act of 1950, 64 Stat. 1129, reenacted and recodified in 1966 as 28 U.S.C. 2341 *et seq.* (1964 ed., Supp. IV), 80 Stat. 621–624. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 612–614.

Pursuant to 28 U.S.C. 2342, the several courts of appeals have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of such final orders of the Commission as were previously subject to judicial review under Section 31 of the Shipping Act. An order can be attacked only by filing a petition for review within 60 days

[4] The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), both of which relate to enforcement. Section 29 provides for suits by the Attorney General to enjoin violations of Commission orders. Section 30 provides for suits by private parties to enforce unsatisfied Commission awards of reparations.

after its entry (28 U.S.C. 2344); the action is against the United States (*ibid.*) and a copy of the petition must be served on the agency and the Attorney General by registered mail (*ibid.*). The Attorney General is given the responsibility for and control of the interests of the government in all court proceedings under the Act and the agency is authorized to appear in the proceeding as a party and as of right (28 U.S.C. 2348). Finally, the court of appeals in which the record on review is filed is given the exclusive jurisdiction to make and enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency" (28 U.S.C. 2349).

The court below held, however, that the district court should have determined whether the Commission's conclusion in this case was correct, even though it had not been attacked pursuant to the exclusive direct review procedures established by the statute. This notion that the district court should have considered the validity of the Commission's conclusion collaterally is patently inconsistent with the existence of the exclusive statutory review scheme. The essence of that scheme is that Commission orders be reviewed only on a timely petition for review which begins a proceeding where the United States and the Commission are parties; here, however, the Commission's conclusion has in effect been relitigated, after the time for direct review expired, in private

litigation without official notification to the government or any government participation of right.[5]

Moreover, the assumption below that Swedish was not a "party" to the administrative proceeding—and thus not "bound" by it (Pet. App. B, 6)—is inconsistent with the petition for reconsideration that Swedish filed with the Commission, where Swedish asserted that it was represented in the administrative evidentiary proceedings through its agent (see p. 5, note 3, *supra*). In any event, even if Swedish had not been represented before the agency, that fact would not have permitted the district court to decide the issue in disregard of the administrative primary jurisdiction that gave rise to the original reference.

*b.* The decision below is in conflict with *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839. In that case a shipper instituted a proceeding before the Commission to recover reparations for alleged discriminatory practices in violation of various provisions of the Shipping Act. The Commission found that the alleged practices were not violations, but further found that the carrier's charge for demurrage was an unreasonable practice in violation of Section 17 of the Act (3 F.M.B. 608). The shipper

[5] *Volkswagenwerk*, *supra*, on which the court below relied for its decision on the merits, was itself a case in which the Commission's decision under the Shipping Act was rendered upon referral, on primary jurisdiction grounds, by a federal court in California. The Commission's determinations were reviewed, however, under the Administrative Orders Review Act in the Court of Appeals for the District of Columbia Circuit and thereafter on certiorari by this Court. See *Volkswagenwerk*, 390 U.S. at 266–268.

refused the carrier's tender of reparations for the improper demurrage charge and then sued in the district court, alleging the invalidity of the Commission's order and seeking a judgment for the larger amount it had originally claimed before the Commission. The Court of Appeals for the Second Circuit affirmed the district court's dismissal for lack of jurisdiction because the shipper had failed to follow the exclusive remedy provided by the Administrative Orders Review Act of 1950, *i.e.*, appeal from the Commission's order to the court of appeals within the sixty-day period. The ruling below, which would allow the validity of the Commission's orders to be determined by the district court and despite the expiration of the sixty-day period, cannot be squared with *Piazza*.

*c.* The impact of the decision below is not limited to orders of the Federal Maritime Commission. For the scheme of review provided by the Administrative Orders Review Act applies as well to orders of the Federal Communications Commission, the Secretary of Agriculture, the Maritime Administration and the Atomic Energy Commission.

2. Although we believe that this Court should review and reverse the decision below on the ground that it improperly reached the question of the validity of the tariff amendment, we note further that that questions is, on the merits, an important one that would warrant this Court's consideration in an appropriate case. We believe that the court of appeals misapplied this Court's decision in *Volkswagenwerk, supra,* in holding that Terminals' tariff amendment was invalid because it had not received the Commission's specific

prior approval under Section 15 of the Shipping Act.

The dispute in *Volkswagenwerk* was not whether collective action was within the scope of an agreement previously filed and approved by the Commission, but whether a particular agreement, which apportioned certain labor welfare costs, had to be filed at all. In this case, however, the conference--Terminals—was already operating under a basic agreement authorizing its members to act collectively in fixing tariff rates. The issue, therefore, is whether a further agreement affecting such collectively made rates by shifting their incidence is sufficiently within the contemplation of the basic agreement, as already approved by the Commission, so that no further approval is required. The difference between these two types of situation is crucial to the administration of the Shipping Act.

In *Volkswagenwerk,* there was no filing at all with the Commission relating to the subject matter in question. Here, on the other hand, there were both an underlying agreement that had been approved by the Commission, and a filing of the tariff changes, which made them subject to Commission review; upon such review, the Commission may withdraw approval of the basic agreement itself, or require its modification. See *Empire State Highway Transp. Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336, 339 (C.A.D.C.), certiorari denied, 368 U.S. 931.

Thus, the only question here is whether the tariff amendment was in fact within the scope of the basic agreement as approved, a question which turns largely on the Commission's expert knowledge of industry practices and the context in which its own ap-

proval had been given. The court below failed to take into account the numerous decisions which admonish that the Commission be allowed a broad leeway in delineating the scope of such an agreement. *North Atlantic Westbound Freight Ass'n* v. *Federal Maritime Commission,* 397 F. 2d 683, 685 (C.A.D.C.); *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 375 F. 2d 335, 339, 342 (C.A.D.C.); *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission,* 314 F. 2d 928, 935 (C.A. 9); *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277, 281 (C.A.D.C.). Similarly, the court below was mistaken in its view that *Volkswagenwerk* overruled the Commission's interpretation, settled for over 40 years, that a conventional tariff change is not a "modification" which requires approval in addition to the approval of the basic agreement. *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125; *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, affirmed *sub nom. Empire State Highway Transp. Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336 (C.A.D.C.), certiorari denied, 368 U.S. 931; *Agreement No. 9025: Dockage Agreement,* 8 F.M.C. 381; *Continental Nut Co.* v. *Pacific Coast River Plate Brazil Conf.,* 9 F.M.C. 563, 570–571.[6]

[6] The Commission's long-standing interpretation has been directly brought to the attention of Congress on several occasions when related legislative questions were under consideration, and Congress never saw fit to make any changes in Section 15 which would alter the practice. See *Empire State, supra,* 291 F. 2d at 340–341. Indeed, in amending Section 15 in 1961 Congress apparently intended to codify the Commission's interpretation. For it expressly excepted tariff rate changes and explanatory

This issue is important. There are annually filed with the Commission a combined total of almost 300,000 tariff rate changes relating to foreign trade and terminal operations alone. See, *e.g.*, Annual Reports of the Federal Maritime Commission for 1969 at pp. 18, 31, and for 1968 at pp. 31, 45. The vast majority of these changes are undoubtedly filed by conferences operating under approved conference agreements. The ruling below, if allowed to stand, would cast doubt on the validity of many of these, at least those which represent a change in incidence. Since this ruling is contrary to what has been the long-held understanding of the Commission and shipping interests, the question warrants a definitive declaration by this Court.

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regulations made pursuant to an approved conference agreement, from the requirement that "every agreement" or "modification" be filed and approved before being implemented:

"* * * tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with [specified terms]." (75 Stat. 762, 764, 46 U.S. 814 (1964 ed.).)

See H. Rep. 498, 87th Cong., 1st Sess., 19–20, paras. (9)–(11); S. Rep. 860, 87th Cong., 1st Sess., 18; Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Cong., 1st Sess., 460–461. See also *Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61, 66, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (C.A.D.C.).

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1970.

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1361~~ 99

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL
Petitioners,

v.

REDERIAKTIEBOLAGET TRANSATLANTIC
Respondent.

## RESPONDENTS' REPLY TO MEMORANDUM OF AMICI CURIAE

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## RESPONDENTS' REPLY TO MEMORANDUM OF AMICI CURIAE

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The memorandum of the Justice Department and the Maritime Commission as amici curiae, supporting the certiorari petition, should be rejected, or if not rejected, denied.

(a) *Rejection.*

The memorandum was filed after the briefing process on the pending application had been completed (March 29, 1970) and was served on respondents on April 2, 1970, after the deadline for answering the petition (April 1) had

passed. Apart from the infirmity of lateness, the Government's procedure represents an illicit effort to reverse a case from which the Federal Maritime Commission had advisedly held aloof in the District Court and the Court of Appeals. As shown by the annexed affidavit (Exhibit A), the Commission turned its back on the proceedings below after full inquiry into the matters at issue and after dispatching two attorneys to audit the District Court's prehearing conference as official observers. The Government now claims the right to begin the litigating process in this court after purposefully standing clear of the contest at every previous stage. Its procedure constitutes an abuse of this Court's appellate function.

(b) *Denial.*

The Government's request for a writ of certiorari should, if not rejected, be denied because the Government (i) misstates the principal question (collateral attack) cited as justifying review, and (ii) wrongly attributes error to the Court below by misdescribing the Commission action which the Court reversed.

(i) *The misstated question:* Question No. 1 in the Government memorandum is:

> 1. Whether the Federal Maritime Commission's determination of the validity of a conference tariff amendment, on reference from a district court entertaining private litigation, may be attacked collaterally in the district court action rather than in accordance with the exclusive direct review procedures provided by the Administrative Orders Review Act.

The statement of the question treats the decision below as upholding the right of courts to entertain collateral attacks on the rulings of administrative agencies. The Court of Appeals made no such decision, holding only that an agency ruling "did not bind non-parties," and emphasizing that it was "not concerned with the parties to the proceeding."

The following paragraph comprises the Court's entire discussion of the question (Petition, App. B, Offset Opinion, p. 6):

> We need consider only one other matter, the question of the binding effect of the *Boston Shipping* decision even though erroneous. We are not concerned with the parties to the proceeding, as they did not join in the present appeal. Nor is the question whether the decision was an appropriate approval—to the extent that it was an approval—of demurrage charges incurred after its date. We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. *See Columbia Broadcasting System, Inc. v. United States,* 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise § 18.05. Any other conclusion would destroy the statutory requirement.

The quoted passage shows that the Court took care to refrain (and did refrain) from deciding what the Government insists was decided.

The matter of collateral attack is thus reduced to the question whether the respondent (Transatlantic) was a party to the Commission proceedings in the special circumstances of this case—hardly an issue of Supreme Court dimensions.[1]

---

[1]The District Court admitted Transatlantic to intervention on a petition citing the inadequacy of representation by Transatlantic's Boston agent (App. Vol. I, 12-13). Contrary to the Government's assertion (Memorandum, 10), Transatlantic did not assert "that it was represented in the administrative proceedings through its agent." The Government cites its note 3 (Memorandum, 5) in support of this statement, but the note quotes only a Transatlantic averment that it was represented "in Boston" by such agent—not in the Commission case. The Government statement not only stretches the record but tenders a quibble too trivial for this Court. Had the Government wished to contest Transatlantic's intervention, it could have done so by intervening in the District Court instead of going home after the prehearing conference.

Since the Court below did not expose the normal run of administrative rulings to collateral attack, its decision conflicts with no decisions which safeguard such rulings from such attack. For the same reason, the finality of the Commission's order for purposes of direct appeal is not a question open on this record.

(ii) *The substantive decision.*

The Government claims (Memorandum, 11 ff) that an industry-wide shift of terminal charges from cargo interests to ocean carriers was within the terms of an inter-terminal agreement which the Commission had approved, and that the Court below was wrong in ruling otherwise. If the Government's argument is available at this late date, we contest it on the following grounds:

1. It is at odds with this Court's decision in *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261. The Government claims (Memorandum, 13) that a shift in the "incidence" of a charge from one group to another is a "conventional tariff change" which needs no approval. *VW* holds the opposite. The Government sees significance in the detail that in *VW*, no prior agreement had been filed whereas here *an* agreement had been filed and approved. We see no relevance in this unless the approved agreement covered the acts performed under its asserted cover. Collective price allocation not covered by an approved agreement is indistinguishable from similar action not covered by any agreement.

2. The Commission was wrong and the Court below was right as to the scope of the approved agreement, for reasons set forth in the opinion below and at pages 2-3 of respondents' brief in opposition to the pending petition for certiorari. The Commission, in its decision covering 19 pages in the printed Appendix (Vol. I, 60-79), nowhere quoted the language it was interpreting, nor does the Government do so in its present memorandum. The Government asserts (Memorandum, 13) "a broad leeway" for Com-

mission interpretation of agreements. The cases cited for the assertion do not sustain it. They merely concede that the Commission enjoys "reasonable" interpretative leeway, *Swift & Co. v. Federal Maritime Commission*, 306 F.2d 277, 281 (C.A.D.C., 1962); or that its interpretations are entitled to "due deference," *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335, 339 (C.A.D.C., 1967); or "weight," *North Atlantic Westbound Freight Ass'n. v. Federal Maritime Commission*, 397 F.2d 683, 685 (C.A.D.C., 1968). No case suggests that the Commission can claim infallibility even when construing unrevealed language. Moreover, every case cited for the "broad leeway" doctrine involved a Commission finding that actions other than normal rate increases or decreases were *not* sanctioned by the agreements and approvals cited to justify them. The Government now claims that these same cases establish a doctrine of complete permissiveness: as long as some agreement has been approved, it can be stretched to cover any form of concerted action by the parties no matter what its provisions may be. The sponsorship of this doctrine by any Government officer and most particularly by the chief of the Antitrust Division is a major puzzlement.

3. The Commission's right to receive normal tariff changes –the type which raise or lower the rates on beans or automobiles–without requiring amendment of the agreements which authorize them, has not been impaired by the Court below. Its footnote No. 3, suggesting that *VW* superseded *Empire State Highway Transp. Assn., Inc. v. Federal Maritime Commission*, 291 F.2d 336 (D.C. Cir., 1961), cert. denied, 368 U.S. 931, contained a sufficient caveat, noting that "some changes in rates and charges are now expressly allowable without approval under the 1961 amendment to section 15."

Before the 1961 amendment, § 15 provided that before approval, "it shall be unlawful to carry out" any agreement or modification of an agreement subject to its terms. The

1961 amendment (Pub. L. 87-346) added an exception:

> ". . . except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof . . . agreed upon by approved conferences, and changes and amendments thereto . . . shall be permitted to take effect without prior approval . . ."

This amendment was virtually coextensive with *Empire State*. In citing the amendment (enacted after *Empire State*—on October 3, 1961), the Court below left *Empire State* unblemished.

## CONCLUSION

The Government has no right to stand clear of litigation until it turns out against the Government's wishes and then seek in this Court relief which should have been requested of the District Court or the Court of Appeals. Further, the questions which the Government professes to discern are not tendered by the decision below, which leaves unchanged the regulatory practices which the Government aims to preserve. The Court below properly applied *VW* and made no other change in the powers or procedures of the Maritime Commission.

Respectfully submitted,

GEORGE F. GALLAND
AMY SCUPI
*Attorneys for Respondent*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1251

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PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL
Petitioners,

v.

REDERIAKTIEBOLAGET TRANSATLANTIC
Respondent.

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## AFFIDAVIT OF GEORGE F. GALLAND

District of Columbia, ss:

George F. Galland being duly sworn, states:

1. I am one of the attorneys for the respondent (hereafter, Transatlantic). This affidavit is submitted in conjunction with respondent's opposition to the memorandum filed by the United States and the Federal Maritime Commission as amici curiae (hereafter government memorandum).

2. The Federal Maritime Commission has been fully aware of the litigation here involved from a date prior to the prehearing conference before the District Judge (Wyzansky) on April 25, 1969. On April 23, 1969 the Com-

mission's General Counsel (James L. Pimper) and Solicitor (Kenneth H. Burns) telephoned my partner, Mrs. Amy Scupi, to discuss the posture of the case in the District Court, and requested permission to examine our files. Mrs. Scupi summarized the case to Mr. Burns and offered him full access to the files. The next day Norman C. Barnett, Esq., an attorney on Mr. Burn's staff, visited my office and I delivered for his unrestricted inspection our complete files which he examined for about an hour.

3. On April 25, Judge Wyzansky held a prehearing conference in Boston. Mr. Burns and Mr. Barnett both attended such conference as observers for the Commission, and remained in attendance until the conference ended. The issues of fact and law were openly canvassed in their presence and hearing.

4. Judge Wyzansky announced at the prehearing conference that the case would be tried on Monday, April 28. I asked Messrs. Burns and Barnett whether the Commission would send a representative or seek to participate in the trial. Mr. Burns replied that a decision would be made over the weekend.

5. When the case was called on the 28th, no Commission representative was present and the Commission made no move to enter the case in any capacity in either the District Court or the Court of Appeals—or in this Court until the filing of its memorandum as amicus curiae, dated "March 1970". It was received by mail in my office on April 2, 1970, by which date the time for answering the petition for a writ of certiorari had expired.

George F. Galland

Sworn to before me this day of April, 1970.

Notary Public
My commission expires November 30, 1973

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# Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 1251.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL.,
*Petitioners,*
*v.*
REDERIAKTIEBOLAGET TRANSATLANTIC,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS.

### Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reported in 420 F. 2d 419. The opinion of the United States District Court for the District of Massachusetts is not officially reported. The opinion of the Federal Maritime Commission is reported in 10 F.M.C. 409.

### Jurisdiction of this Court.

The judgment of the Court of Appeals for the First Circuit was entered on January 8, 1970 (A. vol. I, p. 52). The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1964). The petition for certiorari was filed in this Court on February 27, 1970, and certiorari was granted April 20, 1970 (A. vol. I, p. 53).

**Provisions of Statutes.**

46 U.S.C. § 814 (vol. 10, 1964 ed., pp. 8814-8815).

§ 814. *Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.*

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character or freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after dis-

approval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly ap-

prove, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. (As amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88-275, 78 Stat. 148.)

U.S.C. TITLE 28 (1964 ed., Supp. III, vol. 1, pp. 1539-1540).

§2341. *Definitions.*

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§2342. *Jurisdiction of court of appeals.*

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chap-

ters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title. (Added by Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2343. *Venue.*

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. (Added by Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2344. *Review of orders; time; notice; contents of petition; service.*

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt. (Added by Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

## Statement of the Case and Proceedings Below.

### The Procedural Narrative.

#### a. *Summary.*

This case began in the Massachusetts Superior Court in 1965.* The defendants removed it to the United States District Court for the District of Massachusetts. While the case was pending there, the trial judge permitted the defendants to petition the Federal Maritime Commission for determination of the issues. The Commission in 1967 ruled for the plaintiffs. The defendants appealed that ruling to the Court of Appeals for the District of Columbia Circuit which, in 1968, rejected the appeal for lateness. The case was then resumed before the district judge, who permitted Rederiaktiebolaget Transatlantic to intervene as a defendant. The District Court found for the plaintiffs in 1969. All the defendants acquiesced in that ruling, except Rederiaktiebolaget Transatlantic which appealed from the District Court judgment to the Court of Appeals for the First Circuit. That Court on January 8, 1970, reversed the District Court's judgment, and the case is here on a writ of certiorari to the Court of Appeals for the First Circuit pursuant to plaintiffs' petition.

#### b. *The Parties and the Issue.*

The plaintiffs are the Port of Boston Marine Terminal Association (PBMTA) and its members: The Massachusetts Port Authority, Mystic Terminal Co., Port Terminals, Inc., Wiggin Terminals, Inc., and the New York Central Railroad (now the Penn Central Co.) (A. vol. I, p. 9). In this brief, PBMTA and its constituent members will be referred to, where appropriate, as "Terminals."

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* Record references and more particular dates are contained in parts b through h below, which this paragraph merely summarizes.

Originally, the defendants were the Boston Shipping Association and its members, thirteen corporations and partnerships representing the interests of vessels and stevedores using the terminal facilities of the Port of Boston (A. vol. I, pp. 9-11). This brief will refer to those defendants collectively as "Shipping."

The tariff of Terminals is issued under Federal Maritime Commission Agreement No. 8785 (A. vol. II, p. 5), a conference agreement approved by the F.M.C. (A. vol. I, p. 21). Prior to 1965, Terminals' tariff provided that charges for demurrage or storage of cargo during longshoremen's and clerks' strikes, as at other times, would fall on those parties claiming an interest in the cargo, *e.g.*, consignees. Longshoremen and clerks are employed by vessels and vessel interests, however, who still have custody and control of the cargo during such strikes. Terminals decided, in 1964 and 1965, to shift the incidence of that charge from cargo interests to the vessel delivering the cargo.

Shipping contended that this shift in the incidence of strike storage charges was unlawful under the Shipping Act, 1916 (46 U.S.C. sec. 801 *et seq.*).

### c. *The Court Action.*

Terminals, in 1965, brought a petition against Shipping for declaratory relief and damages in the Superior Court of the Commonwealth of Massachusetts for Suffolk County (A. vol. I, p. 9). The suit sought, first, a declaration of the validity of the tariff change affecting strike storage charges, and, secondly, an order requiring the defendants to pay the charges.

On September 1, 1965, Shipping removed the action to the United States District Court for the District of Massachusetts (A. vol. I, p. 13) and filed its answer (A. vol. I,

p. 15). Shipping invoked the District Court's jurisdiction under 28 U.S.C. § 1441 (b) (1964) relative to actions alleging a claim under the laws of the United States (A. vol. I, p. 14).* Shipping's answer denied the legality of the tariff change and alleged that Terminals had failed to comply with the Shipping Act, 1916 (A. vol. I, pp. 16-17).

On January 13, 1966, Terminals moved that the District Court either order the simplification of issues or grant summary judgment for Terminals (A. vol. I, p. 18). The motion suggested that the simplifying order take the form of a permission for Shipping to proceed before the F.M.C. for review of the tariff change. If Shipping did not so proceed, the motion proposed that the Court then consider the tariff change valid for the purpose of the litigation (A. vol. I, p. 18).

On March 11, 1966, the Court, stating that the F.M.C. had primary jurisdiction to determine the lawfulness and reasonableness of the tariff change, ordered that litigation be stayed so as to allow Shipping to secure an F.M.C. rul-

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* While it may be that no one will challenge the District Court's removal jurisdiction under 28 U.S.C. § 1441 (b), this Court may of course question it upon its own motion. The District Court dealt with the problem of jurisdiction at A. vol. I, p. 40, and the Court of Appeals at A. vol. I, pp. 48-49. It is submitted that the authorities there cited sufficiently support the conclusion of the Courts below. Original jurisdiction would have existed under 28 U.S.C. § 1337. See American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Tentative Draft No. 3, pp. 29-30, to the effect that suits for collection or refund of freight charges, demurrage, and the like lie under section 1337 irrespective of the amount involved; it is there noted, *inter alia*, that "These rate disputes do have far reaching implications, and decision of them requires application of a distinctly federal body of materials." See, in addition to the cases cited by the Courts below, *Louisville & Nashville Railroad Co.* v. *Rice*, 247 U.S. 201, 203 (1918); and *Atchison, T. & S. F. Ry. Co.* v. *Springer*, 172 F. 2d 346, 349 (7th Cir. 1949), the latter case involving demurrage charges under an I.C.C. tariff, as did *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 271 U.S. 259, 261, 262 (1926), cited by the Court of Appeals.

ing on the issue. The parties, within 60 days, were to report what action was taken pursuant to the order. The Court retained jurisdiction (A. vol. I, pp. 23-24) and the parties subsequently reported that Shipping had begun F.M.C. proceedings (A. vol. I, p. 24).*

d. *Before the Federal Maritime Commission.*

On April 21, 1966, Shipping filed a complaint with the F.M.C. challenging the lawfulness and reasonableness of the tariff charge in question. The complaint bore the docket number 66-28 (A. vol. I, p. 24).

After a hearing before a trial examiner, the Commission considered the matter on Terminals' exceptions to the examiner's rulings. The Commission issued its final report and order on June 28, 1967, which was reported in *Boston Shipping Association, Inc.* v. *Port of Boston,* 10 F.M.C. 409 (1967) (A. vol. II, p. 49). The F.M.C. held (1) that § 17, Shipping Act, 1916, governs the assessment of strike storage charges for cargo on Boston piers during longshoremen's strikes; (2) that shifting the charge from cargo interests to the vessel did not require prior approval by the F.M.C. under § 15 of the Act; and (3) that assessment of the charge against the vessel for cargo which was still in free time (that is, five days following discharge from the vessel) when the strike began, was neither a prohibited practice under § 17, nor a prejudicial action under § 16 of the Act.

e. *Shipping's Appeal from the F.M.C. Decision.*

On September 19, 1967, Shipping appealed the F.M.C. decision by way of a petition for review filed in the Court of Appeals for the District of Columbia Circuit (A. vol. I,

* Subsequently, the Court added to its order a provision reserving to the parties their appropriate rights of appeal from an F.M.C. decision (A. vol. I, p. 25).

p. 67). On March 18, 1968, the Court of Appeals dismissed the petition for lateness (A. vol. II, p. 67). Shipping sought a rehearing, but the Court denied it (A. vol. II, p. 68).

f. *Transatlantic's Petition for Reconsideration.*

On March 6, 1968, the United States Supreme Court decided *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (the *"VW"* case). Six months later, on September 4, 1968, long after the Court of Appeals for the District of Columbia Circuit had denied Shipping's appeal from the F.M.C. decision, Rederiaktiebolaget Transatlantic ("Transatlantic"), a Swedish shipping company theretofore represented by Furness, Withy & Co., a member of Shipping, petitioned the F.M.C. to reconsider its decision because of the supposed effect of the *VW* case upon that decision (A. vol. II, p. 69). The F.M.C. declined to accept the petition for reconsideration because it was not filed within the time provided by its Rules for such petitions (A. vol. II, p. 77). See F.M.C. Rule 16 (a), 46 C.F.R. § 502.261 (1970). Transatlantic sought no review of the F.M.C.'s refusal to accept the petition.

g. *Further Proceedings in the United States District Court for the District of Massachusetts.*

The District Court had held that the F.M.C. had primary jurisdiction of the issues in the case. Shipping, accordingly, had sought an F.M.C. ruling which decided the issues adversely to it. The administrative appeal procedures were over. The case was now ripe for a decision by the United States District Court for the District of Massachusetts.

Before the trial began, however, Transatlantic filed a petition to intervene and the Court allowed it (A. vol. I, p. 26). The Court then heard the case on two stipulations of fact. The first stipulation bound Terminals and Shipping alone. It contained the F.M.C. trial examiner's decision and that of the full Commission (A. vol. I, p. 33). It provided that the facts found in those decisions were true (A. vol. I, p. 33); the second stipulation (A. vol. I, p. 35) bound Terminals, Shipping and Transatlantic. It was substantially similar to the first stipulation, but did not contain the provision as to the truth of the facts found by the F.M.C. Transatlantic, however, introduced no evidence contradicting the truth of those facts, so the substantive effect of the second stipulation is the same as that of the first.

On April 27, 1969, the District Court (Wyzanski, C.J.) ruled as follows:

1.) The F.M.C. had primary jurisdiction of the subject matter of the dispute;

2.) the District Court was not the appropriate tribunal to review the F.M.C. decision;

3.) even if the Court were to review the F.M.C. decision, it could set that decision aside only if it lacked a substantial evidentiary basis or was contrary to the Constitution or the statute law;

4.) the F.M.C. decision reflected an expertise developed in its administration of its statute, and indeed comported with the Court's own construction of the statute (A. vol. I, pp. 40-43).

On May 2, 1969, the District Court entered a judgment declaring the validity of the tariff change and ordering the defendants to pay the balance due from each on account of the strike storage charges (A. vol. I, pp. 43-44).

All of the defendants except Transatlantic, the intervener, acquiesced in the District Court judgment. Trans-

atlantic, however, appealed from the judgment to the Court of Appeals for the First Circuit (A. vol. I, p. 45).

h. *To the Court of Appeals for the First Circuit.*

The Court of Appeals heard Transatlantic's appeal on October 8, 1969. Thereafter, on January 8, 1970, the Court of Appeals filed its decision and judgment (A. vol. I, pp. 46-52). The Court reversed the judgment entered by the District Court and found that the *VW* case (390 U.S. 261) required specific F.M.C. approval of the change in incidence of the tariff charge. Terminals challenged the Court of Appeals' decision and, on February 27, 1970, filed with this Court a petition for a writ of certiorari. Certiorari was granted April 20, 1970 (A. vol. I, p. 53).

THE SUBSTANTIVE NATURE OF THE PROBLEM.

PBMTA operates under F.M.C. Agreement No. 8785, a conference arrangement approved by the Commission (A. vol. II, p. 5). The terms of Agreement No. 8785 authorize the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, usage charges and services and facilities incidental thereto, and require the filing of pertinent tariffs with the Commission. PBMTA's members were the Massachusetts Port Authority, the New York Central System, the Mystic Terminal Company, Port Terminals, Inc., and Wiggin Terminals, Inc., all as operators of terminals in the Port of Boston. None of these operators of terminals is a carrier.

Agreement No. 8785 recites that it is an agreement entered into under § 15 of the Shipping Act, 1916, "by and among the Marine Terminal Operators of the Port of Boston, Massachusetts relative to rates of and charges by the parties for furnishing wharfage, dock, and other ter-

minal facilities in the Port of Boston in connection with common carriers by water as defined in the Shipping Act" (A. vol. II, p. 5). The Agreement further states that it supersedes a "previous memorandum of cooperative working arrangement by and among the parties (F.M.C. No. 8365)."

By the Agreement the parties associated themselves into the Port of Boston Marine Terminal Association, each representing that it was an owner or an operator of a marine terminal at Boston and that it furnished "wharfage, dock, or other terminal facilities in connection with common carriers by water at the Port of Boston" (A. vol. II, pp. 5-6). Under Article Second of the Agreement, the Agreement and any amendments were subject to the approval of the Agency (*i.e.*, the Commission). (For the Commission's approval of the Agreement, see A. vol. I, p. 21.)

The Agreement further sets forth in Article Third that "This agreement shall cover the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity."

Methods of holding meetings and electing officers are set forth in Articles Fourth and Fifth (A. vol. II, pp. 6-7).

In Article Sixth the parties agree that "their respective tariffs, rates, charges, classifications, rules and regulations, and additions thereto and changes therein, adopted pursuant to this agreement and covering the subject matter referred to in Article Third shall be filed promptly with the Agency. They further agree that no changes in said tariffs, rates, charges, classifications, and rules and regulations shall be made without prior notice of such changes to members of the Association, who shall be afforded an opportunity for consultation and for the making of such exceptions as they may desire in the tariff rates, charges, classifications, and rules and regulations, with the under-

standing that the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other parties hereto, but not earlier than forty days after notice of the prior notice hereinabove referred to" (A. vol. II, pp. 7-8). Article Sixth also provides for public notice prior to tariff changes. The remaining articles concern themselves with adherence to the rates and tariffs to be published by PBMTA (Seventh) (A. vol. II, p. 8), applications for membership (Eighth) (A. vol. II, pp. 8-9), prorating of expenses (Ninth) (A. vol. II, p. 9), withdrawals (Tenth) (A. vol. II, p. 9), and miscellaneous matters (Eleventh through Fifteenth) (A. vol. II, pp. 9-10).

PBMTA's tariff assessed dockage against the vessel on general cargo at 20¢ per ton (A. vol. II, p. 37). Wharf demurrage was assessed against cargo interests at 2½¢ per 100 pounds per day (A. vol. II, p. 40). Dockage is defined by the tariff as the charge assessed for the service of providing space alongside the wharf or pier for the docking or berthing of watercraft or the mooring of watercraft (A. vol. II, p. 17), while wharf demurrage is a charge assessed against cargo after the expiration of the period commonly known as free time (A. vol. II, p. 19). Free time is defined as the period in which cargo is allowed to remain on a pier free of charge prior to loading of a vessel or after discharge from a vessel (A. vol. II, p. 17). The tariff provided (and still provides) for a free time of five days on import cargo and seven days on export cargo (A. vol. II, p. 32). No issue was presented to the Commission as to the reasonableness of these free-time allowances (A. vol. II, p. 52). PBMTA's tariff also provided a $1.75 per ton wharfage charge assessable to the cargo (A. vol. II, p. 38). This was the charge for the use of the pier or wharf.

The practice in the Port of Boston is that, on inbound shipments, the vessel sends an arrival notice to the consignee, who usually receives it the morning the vessel docks, but never later than the completion of discharge (A. vol. II, p. 53). The major portion of the cargo is picked up by the consignee during free time (*ibid.*). The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a tally clerk, an employee of the vessel; while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally proffered by the tally clerk; and, lastly, a second or delivery clerk enters the data in a "delivery book," at which time the truckman or handler signs against the receipt of the delivery of the cargo (*ibid.*).

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally inside the pier shed to which the cargo is removed from discharge from the vessel (A. vol. II, p. 52). It is the vessel's obligation to move the cargo to the place of rest (*ibid.*). Stevedoring companies, under contract with the vessel, perform this service with longshoremen. The latter are members of longshoremen's locals of the International Longshoremen's Association (*ibid.*). During strikes by these longshoremen's locals, trucking and railroad employees observed the picket line and did not pick up cargo (A. vol. II, p. 55). The Boston Shipping Association also negotiates with respect to Local 1066 of the International Longshoremen's Association, of which the members are the clerks (A. vol. II, p. 52). Tally clerks and other clerks of B.S.A. go on strike at the same time as the longshoremen's locals (A. vol. II, p. 54).

Under the tariff prevailing under Agreement No. 8785 prior to the change, when cargo was " 'prevented from removal by factors beyond the consignees' control such as

strikes, weather conditions, or similar situations affecting the entire Port area,'" wharf demurrage was assessed on cargo at a reduced rate of 1¢ per 100 pounds per day (*i.e.*, reduced from 2½¢), but continued to be assessed against the cargo (A. vol. II, p. 52).

PBMTA recognized a problem in assessing wharf demurrage during strikes against the consignees on receiving a letter from one of its members, the Massachusetts Port Authority, on August 5, 1964. The author of the letter, Joseph J. Connolly, the pier superintendent of the Port Authority, stated: "Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times it seems almost useless to advise them that a reduction in charges is established for that purpose.

"I am of the opinion we should establish a more compatible understanding with customers of Boston and assess a charge against the vessel. Consignees, in most instances, are desirous of taking custody of their cargo as quickly as possible and we all know the turmoil that exists on the piers if a 'strike is imminent' " (A. vol. I, p. 22).

The members of PBMTA subsequently determined upon a change in the manner and rate of charging wharf demurrage during longshoremen's and clerks' strikes. The charge is now made against the vessel rather than the cargo, and the rate is reduced to ½¢ per 100 pounds per day (A. vol. II, p. 54). This charge applies when the removal of cargo is prevented by strike of the "vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel" (A. vol. II, p. 46). No charge is made when removal of cargo is prevented by a strike of the terminal employees (*ibid.*). The consignee in any case would be entitled under this tariff to a full five days' free time.

## How the Commission Dealt with this Problem.

The Commission in its report discussed at length the effect of the free-time clause on the duties of the carrier and the terminal. It pointed out that the obligation of the vessel is to make sure that the consignee has a reasonable opportunity to pick up his cargo, and that the purpose of free time is to make the opportunity a matter of tariff obligation (A. vol. II, pp. 60-62).

The Commission observed: "Once free time has expired, the vessel's transportation obligation has ended" (A. vol. II, p. 62). For this reason, the Commission concluded "that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel" (A. vol. II, p. 62).

As to cargo which was still on free time at the commencement of a strike, the Commission held that it was not unreasonable to charge the vessel, because it is still "the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services" (A. vol. II, p. 61).

The Commission observed, on the section 15 issue that

> "The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.
>
> "Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services" (A. vol. II, p. 56).

**Summary of Argument.**

I. The respondent, Transatlantic, seeks to reverse the F.M.C determination that the shift in incidence of strike storage charges from cargo to vessel was not a modification of Agreement No. 8785 requiring approval by the F.M.C. under § 15 of the Shipping Act, 1916.

Settled principles of administrative and judicial procedure preclude the maintenance of Transatlantic's position.

A.) The agency's decision was a final order reviewable solely by a petition for review to the Circuit Court of Appeals. The defendants Shipping, among whom Transatlantic was represented by a member, applied for such review, and it was denied because of lateness. Transatlantic waited until six months had passed after entry of the final judgment of the Court of Appeals for the District of Columbia Circuit before seeking, in its own name, to reopen the F.M.C. proceedings. The Commission rejected Transatlantic's petition, but Transatlantic sought no review of the rejection. Both Shipping and Transatlantic failed to exhaust administrative remedies. This failure bars review of the F.M.C. decision, and the Circuit Court of Appeals for the First Circuit erred in ruling otherwise. (Pages 22-25.)

B.) Transatlantic was represented before the F.M.C. at all relevant times. Its presence there renders it a party to the agency decision, bound by the terms of the order and subject to the statutory limits of review. An attempt to transcend the order or enlarge the manner of review violates the principle of collateral estoppel. The Court of Appeals for the First Circuit erred in not properly applying that principle. (Pages 25-28.)

C.) As the District Court ruled, the F.M.C. has primary jurisdiction to determine the validity of the shift in incidence of strike storage charges from cargo to vessel. The

Court of Appeals for the First Circuit seriously undermined the concept of primary jurisdiction by failing to grant any credit to the agency decision, which was based on the agency's practical experience interpreting agreements subject to its approval, and on its long-standing and court-approved construction of the relevant statutes. The Court of Appeals' refusal to apply the doctrine of primary jurisdiction was reversible error. (Pages 28-29.)

II. Apart from the question of jurisdiction, the Court of Appeals for the First Circuit failed to accord the F.M.C. decision that respect and deference to which, as the United States Supreme Court has ruled, such decisions are entitled. The Court of Appeals erred in so discounting the F.M.C. decision. (Pages 30-33.)

III. As a matter of substantive law, the shift in PBMTA's tariff in incidence of strike storage charges from cargo to vessel was well within the bounds of activity permitted by Agreement No. 8785 which had been approved by the F.M.C. The Court of Appeals erred in deciding that the F.M.C. had to give separate approval to a tariff shift in incidence of strike storage charges.

A.) The Court of Appeals applied the *VW* case to the circumstances of this case. The *VW* case, however, concerned a completely new and hitherto unapproved agreement to raise a fund to minimize the effect of technological unemployment. There was no conference agreement. The case raised no question as to whether the new agreement for the assessment of charges fell within a prior approved agreement. In the present case, to the contrary, the issue precisely raised is whether the shift in incidence of strike storage charges was authorized by the terms of Agreement No. 8785. Nothing in *VW* bears on the correctness of the F.M.C.'s decision in a case, such as this, where an existing conference agreement is being interpreted. (Pages 33-34.)

B.) In addition to denying the F.M.C. any deference with respect to its determination of the law, the Court of Appeals discountenanced the F.M.C.'s traditional view that changes in terminal charges under a tariff are permissible under approved conference agreements. (Pages 34-41.)

C.) In ruling that the tariff modification at issue here required separate F.M.C. approval, the Court of Appeals ignored the administrative standards developed on a case-by-case basis by the agency and by the courts for the purpose of determining what modifications of tariffs amount to such substantial changes as to require separate approval. Application of those standards to the change at issue here inescapably leads to the conclusion that the F.M.C. and the District Court were correct in their judgments and that the Court of Appeals erred in reversing those judgments. The terms of Agreement No. 8785 do not themselves specify the incidence of any charges, and therefore a shift in the incidence of a tariff charge can hardly represent a "modification" of Agreement No. 8785. (Pages 41-46.)

## Argument.

### I. The Commission having Determined that a Change in Incidence of Certain Charges under Agreement No. 8785 was Not a Modification Requiring Further § 15 Approval, that Determination Could Not be Collaterally Attacked.

Although such doctrines as exhaustion of remedies, administrative *res judicata*, and primary jurisdiction should not be applied where the administrative remedy is inadequate, *Greene* v. *United States*, 376 U.S. 149, 163 (1964), the remedy provided by § 22 of the Shipping Act, 1916, 46 U.S.C. § 821, the provision for intervention in Rule 5(1) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72, and the judicial review procedure set

forth in 28 U.S.C. §§ 2341-2344, were and are abundantly adequate. These remedies certainly do not become inadequate because of the expiration of time limitations.*

Often it is vitally important to have matters finally adjudicated so that the persons involved can proceed to other business.

In the case at bar, the decision of the Commission was issued in June of 1967, about three years ago. Shipping appealed from the decision but the appeal was dismissed, and the decision became final. About six months after the *VW* decision in the Supreme Court and the argument of the present case on review in the Court of Appeals for the District of Columbia, Transatlantic presented its petition for reconsideration to the Commission. The Commission may have had power, if it wished, to entertain such a petition for good cause but did not do so. Shipping Act, 1916, § 25, 46 U.S.C. § 824. Transatlantic failed to pursue the matter further. Since then Boston has experienced a prolonged dockworkers' strike.

The chronology strongly suggests the applicability of all three doctrines of exhaustion of remedies, *res judicata*, and primary jurisdiction. The doctrines are not always susceptible of clear and unambiguous restatement. But the three doctrines together, in the circumstances, point to summary rejection of the defenses asserted by Transatlantic.

A. *Having Failed to Exhaust its Administrative Remedies by Seasonably Intervening before the Commission and*

*Compare *First National Bank of Greeley* v. *Board of County Commissioners of County of Weld*, 264 U.S. 450 (1924), where exhaustion was required although the statutory time on administrative remedies had presumably run by. Accord, *McKart* v. *United States*, 395 U.S. 185, 193-197 (1969) (failure to exhaust remedy in selective service case held not fatal in criminal case).

*Appealing, Transatlantic was Barred from Raising the Issues in Question.*

The proceedings in the Federal Maritime Commission were open and Transatlantic and Shipping each had methods of obtaining review. The so-called Hobbs Act would have provided the method of review from the Commission's determination in this area if any errors were committed. 28 U.S.C. §§ 2341-2344. The intent of that legislation is to make agency determinations final, subject to judicial review upon the agency record. Frankly, it is difficult to understand any basis for an argument that this Act was not binding on Shipping at least. The Act specifically covers *inter alia* "such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; . . ." 28 U.S.C. § 2342 (3). Compare *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 (1966) (reparation case).

Review under this Act was sought by Shipping in the Court of Appeals for the District of Columbia Circuit but was dismissed for lateness (A. vol. II, p. 67). But under § 2342 the Court of Appeals on such a petition has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the order being reviewed. That the remedy is exclusive was held in *D. L. Piazza Co.* v. *West Coast Line, Inc.,* 210 F. 2d 947 (2d Cir. 1954), cert. den. 348 U.S. 839.

Transatlantic may contend (as in its Memorandum in this Court opposing issuance of the writ of certiorari, page 4) that the Commission's decision was not a "final order" of the type committed to the exclusive reviewing jurisdiction of the Courts of Appeals under 28 U.S.C. § 2342, and that the Commission's ruling resulted in no determination of or exoneration of liability. Transatlantic has already

thus suggested that the Commission in 10 F.M.C. 409 was dealing with only a few of the issues and could not deal with anything finally.

On the contrary, there is just as much finality in the order of the Commission here involved as there was in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 390 U.S. 261 (1968). That case was somewhat similar in judicial and procedural structure to the present one in its initial phases. The Pacific Maritime Association sued two marine terminal companies (Terminals) in the California federal court. *VW,* being impleaded, obtained a stay of the action to permit it to invoke the primary jurisdiction of the Commission to determine three issues—whether the assessments were claimed pursuant to an unapproved § 15 agreement; whether *VW* was subjected to unreasonable prejudice or disadvantage under § 16; and whether the assessments constituted an unjust and unreasonable practice under § 17. *VW* filed its complaint with the Commission. The Commission ruled on those three issues, two Commission members dissenting. *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp.,* 9 F.M.C. 77 (1965). The case was brought to the Court of Appeals for the District of Columbia Circuit on a petition for review. *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 371 F. 2d 747 (D.C. Cir. 1966). This Court granted certiorari to review that Court's determination, 388 U.S. 909 (1967). Apparently no one thought of asserting that the Commission's order was not a "final order" that could not be reviewed. That would have been a rather wild assertion, to put it mildly.

Cases of review in which the issue of finality was argued and resolved adversely to Transatlantic's anticipated contention as to lack of finality include: *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 198-200 (1956) (peti-

tion to review refusal of Federal Communications Commission to amend certain rules); *Frozen Foods Express* v. *United States,* 351 U.S. 40, 43-44 (1956) (determination that certain commodities were not agricultural commodities under the Federal Motor Carrier Act held "final" and hence reviewable even though purely declaratory).

Transatlantic may also advance the argument that no declaratory order is reviewable under 28 U.S.C. §§ 2341-2344. The *Frozen Foods Express* case, just cited, is authority against such a contention. It used to be that a declaratory order was not ripe for review even though a coercive order would be ripe, but the law has been otherwise for many years. 2 Davis, Administrative Law, § 21.07. The test of ripeness should be whether the legal rights and duties of the parties are affected by the order in question. In the present circumstances rights and duties were clearly affected.

The Commission ordered Terminals to "amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein" (A. vol. II, p. 66). Under § 23 (46 U.S.C. § 822) of the Shipping Act, 1916, that order "shall continue in force until" further order of the Commission unless suspended, modified, or set aside by the Commission or "suspended or set aside by a court of competent jurisdiction." That order, it may be assumed, was complied with by Terminals promptly. It would have required something out of the ordinary in foresight for Terminals to say to the Commission, "No, your order is not final." Failure to comply with the Board's order would have rendered Terminals subject to a civil suit for enforcement under § 29 (46 U.S.C. § 828); and criminal penalties under § 32 (46 U.S.C. § 831).

B. *Transatlantic is Barred by Collateral Estoppel from Relitigating the Issues which it Sought to Raise in the*

***District Court. Those Issues had been Determined by the Commission, before whom Transatlantic's Interests were Represented.***

The Court of Appeals for the First Circuit reasoned that Transatlantic had not been a party to the agency proceedings (A. vol. I, p. 51). But, as is pointed out in 2 Davis, Administrative Law, § 18.05, the determination of whether one was a party in a prior proceeding is not always a purely mechanical matter.

At all material times Furness, Withy & Co., Ltd., was a party to the proceedings represented by counsel for Shipping (A. vol. I, p. 27). It is undisputed that Furness, Withy was the agent of Transatlantic. Transatlantic, in its moving papers seeking intervention in the District Court proceedings, stated *inter alia:* "1. Transatlantic is a common carrier by water operating a steamship business in the foreign commerce of the United States. At all times relevant to the issues involved in this case, Transatlantic was represented at the Port of Boston by its agent, Furness, Withy & Co., Ltd." (A. vol. I, p. 26). Transatlantic then stated—as was the fact—that something more than $8,000 of demurrage charges against Furness, Withy were subject to reimbursement from Transatlantic (A. vol. I, p. 27). Transatlantic then stated that on September 4, 1968, "Transatlantic, which at all times prior thereto had been represented by counsel for Furness, Withy," petitioned the Commission for rehearing (A. vol. I, p. 27).

Subsequent portions of this document make it quite clear that Transatlantic considered Furness, Withy to have been acting for it at all times, both in the practical aspects of the berthing and service of its vessels in the Port of Boston and in the legal proceedings before the Commission. The expressed reason for the intervention by Transatlantic was not that it was a stranger to the proceedings but,

rather, that Transatlantic felt its interests had not been and were not being protected sufficiently by Furness, Withy (A. vol. I, pp. 28-29).

In Restatement: Judgments, § 85 (1), it is stated: "Where a judgment is rendered in an action in which a party thereto properly acts on behalf of another, the other is (a) bound by and entitled to the benefits of the rules of res judicata with reference to such of his interests as at the time are controlled by the party to the action; (b) not bound by or entitled to the benefits of the rules of res judicata with reference to his interests not controlled by the party to the action." The present situation is within the Restatement's rationale.

The applicable standard is not mechanistic. Thus, in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940), dealing with the question of privity among government agencies as parties, this Court pointed out, "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611, 620, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same.' " Other cases of a similar tendency are cited in the opinion in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*.

A different approach would lead, as it has in this case, to conflicts between the court and the regulatory agency regarding future conduct. "In cases where an order is directed to future relationships, the decision of that agency which has the major and continuing responsibility should prevail." Jaffe, Judicial Control of Administrative Action, p. 135. Conflicts between courts and administrative agencies would lead to vexatious consequences for the public and for the business interests involved if agency de-

cisions were subject to collateral challenge in the courts and were not given finality, even though precisely the same claims and transactions were involved. The practical basis of the law of *res judicata* is suggested by Restatement: Judgments, § 1:

> "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them."

Such opportunity was afforded Shipping and Transatlantic in the Commission proceeding with reference to Transatlantic's claims in the District Court and there is no occasion to reopen the problem.

C. *Primary Jurisdiction to Test the Validity of the Change in Question was in the Commission, and it was Error to Require or Permit Redetermination in the District Court.*

This doctrine and that of exhaustion of remedies are related in their general basis. In its order of March 11, 1966, the District Court determined that the Commission had initial primary jurisdiction. At that point Shipping was asserting that Terminals had not complied with the Shipping Act, 1916. (A. vol. I, pp. 16-17.) The District Court's order was entirely in accordance with settled practice. The primary jurisdiction of the Commission and its predecessor agencies has been upheld in two leading determinations of this Court. *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474 (1932); *Far East Con-*

*ference* v. *United States*, 342 U.S. 570 (1952). The District Court properly retained jurisdiction because the District Court had jurisdiction to grant relief after the Commission acted. Compare *Bird* v. *S.S. Fortuna*, 262 F. Supp. 24 (D. Mass. 1966) (case stayed pending resort to Commission to determine validity of tariff exculpatory clause); *E. B. Ackerman Importing Co.* v. *City of Los Angeles*, 61 Cal. 2d 595, 39 Cal. Rptr. 726, 394 P. 2d 566 (1964) (same).

The issue of validity, subject to review in an appropriate Court of Appeals, should ordinarily be determined with finality. In *Far East Conference* v. *United States, supra*, 342 U.S. 570, 577, involving the dual rate system adopted by a conference of carriers, the Court noted: "An order of the Board will be subject to review by a United States Court of Appeals." Thus, in *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958), the acts of the conference complained of were first reviewed in the Federal Maritime Board and then in the Court of Appeals for the District of Columbia Circuit. There was no tampering with the concept of primary jurisdiction and there was no collateral attack on the Board's determination, even though on direct review the Board's ruling was set aside.

Where the Commission had primary jurisdiction, the referring court—here, the District Court—would have had no jurisdiction to allow a collateral attack. The case is procedurally parallel to *United States* v. *Railway Express Agency, Inc.*, 101 F. Supp. 1008 (D. Del. 1951), in which the Court had stayed the proceedings in an antitrust action pending further action by the Interstate Commerce Commission. The Commission upheld the pooling of traffic and service in question. No appeal was taken from the Interstate Commerce Commission's rulings and findings, and the District Court said at page 1012 that the Commission's orders "may not be attacked in a collateral proceeding," refusing the injunctive relief requested by the Government.

II. Even if the District Court had Jurisdiction to Review the Issues Determined by the Commission, the Court of Appeals Erred by Giving the Commission's Findings No Weight Whatsoever.

The Court of Appeals in its opinion paid no heed whatever to the Commission's experience in dealing with filings under approved § 15 agreements. One would have thought that the Commission, having approved the original Agreement No. 8785 and numerous like agreements, would be well qualified to determine whether or not a tariff filing pursuant to the Agreement was so drastic as to constitute a modification of the Agreement.

Whether such changes in tariffs are modifications or not is the kind of issue that has repeatedly been brought before the Commission and its staff. It is not always self-evident what the answer is. In *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (D.C. Cir. 1967), the Court observed, "Of course, we are not unaware that the line between action taken in violation of an approved Section 15 agreement and action constituting a new unfiled Section 15 agreement is seldom a clear and distinct one, and most often such line, if it exists at all, is shrouded by a vast penumbra of doubt. We believe, however, that the Commission is the properly constituted body to scrutinize the conference action and to determine initially upon which side of the line the conference action falls. A Commission determination that the conference action falls within or without the approved agreement must be given due deference by the reviewing court." 375 F. 2d at 339. The Court discussed the duties of the Commission and went on to say: "Because of the difficulties attending precise discernment of the particular nature of each conference action, we believe the Commission should be as liberal as possible, consistent with orderly

administration, in granting a conference the opportunity to demonstrate initially that the subject action is embraced within the existing agreement." 375 F. 2d at 340.

The same Court of Appeals in *North Atlantic Westbound Freight Association* v. *Federal Maritime Commission*, 397 F. 2d 683 (D.C. Cir. 1968), denying an application to stay a Commission order accepting for filing so-called through-intermodal container freight tariffs, pointed out with reference to the conference agreement:

> "The question on the merits is not only how the agreement seems to read to the judges of this court, though that is inescapably involved. Construction of such an agreement involves a question of law but like other questions of law, e. g., interpretation of regulatory statutes, the agency's determination is entitled to weight on judicial reconsideration. Certainly where underlying issues of fact or policy are involved an agency's interpretation of agreements is due judicial respect and deference, *cf.* Great Northern Ry. v. Merchants' Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922). Specifically in regard to conference agreements, the Commission is to be given 'reasonable leeway in delineating the scope' of these agreements, Swift & Co. v. FMC, 113 U.S. App. D.C. 117, 121, 306 F. 2d 277, 281 (1962). In addition, the view on the merits taken by the Commission, presumptively guardian of the public interest, had some bearing on another issue for consideration on a stay application, as indicating the direction of the public interest." 397 F. 2d at 685.

(Subsequent proceedings in that case are reported in 404 F. 2d 803 (D.C. Cir. 1968).)

And in *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962), the Court pointed out that in addition to the experience of the Federal Maritime

Board in dealing with like agreements, the Board had given, as its successor here in the present case, its approval to the original conference agreement and therefore was in a particularly advantageous position to determine the question. 306 F. 2d at 281:

> "Because the 1958 Agreement is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the Board not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. *Moreover, the agreement existed only because approved by the Board.* The Board must be given considerable leeway in delineating the scope of the agreement and therefore the content of its prior approval." (Our emphasis.)

These views are entirely consistent with the decision in *Volkswagenwerk Aktiengesellshaft* v. *Federal Maritime Commission,* 390 U.S. 261 (1968). The Court there took pains to point out (390 U.S. at 272) that "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" The Court then went on to observe that nevertheless the final construction of a statute is still a matter for the courts. We never challenged this view. It is elementary that the interpretation of an act of Congress in the last analysis is a matter for this Court, and that the deference given to an agency's determinations is a matter of reasonable guidance.

The issue in the present case, however, is the interpretation, not of a statute, but of Agreement No. 8785, which exists only by virtue of the approval by the Federal Mari-

time Commission. The interpretation of an agreement by the agency whose approval made it effective and subject to whose continuing jurisdiction the agreement is administered, should be conclusive unless it is clearly contrary to the statute.

## III. The Tariff Change in Question was within the Scope of Agreement No. 8785.

Disregarding any weight that might otherwise be given the Commission's ruling, the terms of Agreement No. 8785 still clearly include the tariff change at issue.

### A. *The VW Case did Not Hold Otherwise.*

The case at bar is pretty clearly not within the *ratio decidendi* of the *VW* case because that case related to a wholly unapproved arrangement for assessing charges for payments into a fund. The fund was to be used to soften the impact of technological unemployment. Assessment by measurement rather than weight resulted in a rate for the petitioner's cars which was ten times that for other Pacific cargo. For reasons which are now merely historical in importance, the Commission decided, by a divided vote, that, despite the unequivocal language of § 15, the arrangement was not under that section because the statute applied only where the agreement affected outsiders. 9 F.M.C. at 82-83.

The Court of Appeals for the First Circuit mistook the statements in this Court's opinion in *VW* with reference to the "expansive language" of § 15 and the "extremely narrow view" of the Commission as indicative of a general disapproval of the Commission's practice with reference to filings under approved § 15 agreements (A. vol. I, p. 50). Terminals submit that no such disapproval appears or is implied in *VW*, and that there was no occasion for such in the *VW* litigation. In *VW* it was virtually admitted that the arrangement fell literally within the language of

the statute. Nothing had ever been approved by the Commission. The language of § 15 is indeed "expansive." And the Commission's ruling there was "narrow." The case, moreover, is one of a kind and will not likely reappear.

In the present situation, it is not the expansive language of § 15 that gives any problem. On the contrary, it is the "extremely narrow view" which the Court of Appeals took of Agreement No. 8785.

B. *Changes in Charges under Terminal Tariffs are Historically Warranted under Approved Conference Agreements.*

In holding that separate § 15 approval of the tariff change was not required, the Commission observed (10 F.M.C. at 413-414; A. vol. II, p. 56):

> "Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges, and while a particular charge in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anti-competitive, monopolistic or rate-fixing scheme not contemplated in the original agreement."

This statement is based on the settled and sound experience of the Commission and its predecessor agencies in administering the Act, initially in the case of conferences of

ocean carriers, *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), and more recently in dealing with marine terminal operators.

The United States Maritime Commission suggested substantially the procedure now followed by terminal conferences in *Transportation of Lumber Through the Panama Canal*, 2 U.S.M.C. 143 (1939). The Commission was dealing there with charges of both carriers and terminal operators on intercoastal lumber transport. It noted (2 U.S.M.C. at 148) that the proceeding was "the first major proceeding involving the services, charges, and practices of terminal operators;" that jurisdiction arose from the definition of "other person" in § 1 of the Act; that "other persons" were required by § 15 to file, and obtain approval of, agreements on rates, etc., and that §§ 16 and 17 prohibited undue preferences and required just and reasonable practices.

After holding that failure of some of the terminal respondents to publish their rates and charges was unjust and unreasonable and was "conducive to undue preference and practice" (2 U.S.M.C. at 149), the Commission stated: "We will not at this time prescribe for terminal operators a detailed system of rules and regulations governing the publication of their tariffs. For the present we suggest that self-regulation through the medium of section 15 agreements approved by us is a much simpler and more satisfactory solution of the problem. A cooperative working arrangement among the terminals, designed to bring about a stable terminal rate structure for the handling of intercoastal lumber, would not only promote the orderly transportation and marketing of lumber, but would foster fair and regulated competition among the terminals themselves. Such an agreement should embody, among other things, the principles set forth in finding (5) hereinafter made" (2 U.S.M.C. at 150). Finding (5) referred to was

as follows: "5. That when respondent terminals undertake the duty of delivering intercoastal lumber and establish the charges, rules, and regulations in connection therewith, said respondents should publish and post a tariff containing said charges, rules, and regulations, and should not make any changes in said tariff except upon thirty (30) days' notice."

Occasionally the procedure under terminal conference agreements came before the Federal Maritime Board and Commission, in disputed adjudicatory proceedings, although one may suppose that the vast majority of filings went unopposed.

In *Empire State Highway Association, Inc.* v. *American Export Lines,* 5 F.M.B. 565 (1959), objecting truckers argued that the issuance of Tariffs Nos. 3 and 4 under a § 15 agreement among pier operators constituted new agreements or modifications thereof which required specific approval under § 15 before being made effective. The nature of the changes in *Empire State* was extensive and not merely limited to the level of rates. In fact, the complainants' argument was that Tariffs Nos. 3 and 4 "not only set forth the rates and charges, but define the nature of the terminals' obligations, adopt rules with respect to their liability, describe the conditions under which others might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded" (5 F.M.B. at 585). The Board held:

> "We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement."

Significantly, the Board went on in that proceeding to inquire into the issue of whether Tariffs Nos. 3 and 4 and the rates, rules, or regulations contained in the tariffs might operate in such a manner as to be unjustly discriminatory or unfair, detrimental to commerce, or violative of the Act. 5 F.M.B. at 587 *ff.* Thus, the circumstance that those tariffs could be filed without prior approval, not being modifications of the original § 15 conference agreement, in no way barred the agency from investigating and holding hearings on the propriety of the rates and practices in the light of the public interest.

The case bearing the same title in the Court of Appeals for the District of Columbia Circuit was not actually on review of the proceeding to which we have just referred, but it involved the same parties and the same factual background.

In *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime Board,* 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931, in holding on a petition for review that the Federal Maritime Board correctly ruled that tariff increases and changes in regulations embodied in a Tariff No. 5 did not constitute a new § 15 agreement or modification under Agreement No. 8005, the Court approved the language quoted above from 5 F.M.B., observing (291 F. 2d at 339):

> "Thousands of rate changes have been agreed upon in concert by conference members in the maritime and related industries under the authority of approved conference agreements, and we are cited to no instance in which conventional rate changes have been held by Board or court to be unlawful because unaccompanied by prior Board approval."

In *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965), the examiner had concluded that, despite the Commission's having approved the terminals' conference agreement, which authorized discussion of and agreement on rates, charges and practices, the fruits of these discussions would have to be not only filed with but also approved by the Commission under § 15. He may have reasoned, correctly, that the exception in § 15 for tariff filings under approved conference agreements, added by the 1961 amendment of § 15, P. L. 87-346, 75 Stat. 764 (1961), was applicable only to carriers filing under § 18 (b).* The Commission at any rate overruled the examiner and stated:

> "Since the provisions of section 18(b) referred to above [*i.e.,* in section 15, which the Commission had quoted at length] require the filing of tariffs only by carriers or conference of carriers, it might be said that the exception to the filing requirements under section 15 refers only to the rates, charges, etc., of approved conferences of common carriers. However, we see no reason to apply a stricter standard and additional requirements for a conference of terminal operators than the statute provides for a conference of common carriers. In this connection see *Empire State Highway Transportation Association* v. *Federal Maritime Board,* 291 F. 2d 336 (D.C. Cir. 1961), where the court of appeals held that certain tariff revisions arrived at by a conference of terminal operators, pursuant to an agreement approved under section 15 by our predecessor the Federal Maritime Board, need not be approved by the Board before becoming effective. . . .

* It may be noted that the Court below, A. vol. I, p. 51, n. 4, mentioned the 1961 amendment, which indeed could not have been relied on either by the Commission or by Terminals in view of its limitation to carrier conferences.

"Since Agreement 9025 does not itself impose any charges, it is impossible on this record to assess its effect on carriers, ports, and the commerce of the United States with any real degree of accuracy. The Commission's power over section 15 agreements, however, consists not only of initial approval, but of continuing supervision; and if at some time in the future, rates, charges, classifications, rules or regulations are established pursuant to the agreement which violate the fair and reasonable standards of the Act the Commission may protect the public interest by withdrawing its approval of the basic agreement itself, or by requiring its modification. *Empire State Highway Transportation Association* v. *Federal Maritime Board, supra* . . ." (8 F.M.C. at 384 and 386.)

That such remedies are adequate was already known to the Commission by reason of such proceedings as *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21 (1948), which considered questions of who should be charged, as well as rates, and yet in which no question of § 15 applying to any tariff as a "modification" of a conference agreement was raised. See also *Intercoastal Steamship Freight Association* v. *Northwest Marine Terminals Association,* 4 F.M.B. 387 (1953), appeal dismissed on ground of lateness sub nom. *Northwest Marine Terminal Association* v. *Federal Maritime Board,* 218 F. 2d 815 (9th Cir. 1955).

Indeed, in *Terminal Rate Structure—Pacific Northwest Ports,* 5 F.M.B. 326 (1957), modifying 5 F.M.B. 53, in which the Federal Maritime Board told the Northwest Marine Terminals Association that, notwithstanding the Freas formula, "in every case the terminal operator may bill and collect from the vessel, and in instances where the charges

are incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee." It is surely implicit in that holding that that Association was not required, in order to publish tariffs in the manner suggested by the Board, to return to the Board for an approved modification of its conference agreement.

In *Persian Gulf Outward Freight Conference*, 10 F.M.C. 61 (1966), affirmed sub nom. *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (D.C. Cir. 1967), the Commission restated the types of conference action that would require separate presentation and approval under § 15, referring to five separate bases for such a requirement (10 F.M.C. at 65):

> "Separate section 15 approval has been required by the Commission and its predecessors of the arrangements (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement (the dual rate contract); (2) representing a new course of conduct (prohibition of brokerage on a particular shipment); (3) providing new means of regulating and controlling competition (port equalization system); (4) not limited to the pure regulation of intraconference competition; or (5) constituting an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement."

The Commission decided another case involving Agreement No. 8785 in *Boston Shipping Association* v. *Port of Boston*, 11 F.M.C. 1, F.M.C. Docket No. 66-35 (1967). A tariff change transferring "Wharfage" as a charge to cargo to a charge against the vessel was held not to be a modification of Agreement No. 8785. The Commission pointed out that the issuance of the item in question was

"merely in implementation of the general ratemaking authority provided in the basic agreement." 11 F.M.C. at 5-6.

The foregoing case development culminates in two regulations of the Commission: 46 C.F.R. part 537, generally regulating conference agreement provisions relating to concerted activities; and 46 C.F.R. part 533, regulating filing of tariffs by terminal operators. The former of these regulations, adopted in 1966, requires proposed conference agreements to provide methods of record keeping and minute taking of conferences. The latter, adopted in 1965, requires terminal operators to file their tariffs with the Commission with terms as defined in § 533.6(d) to the extent applicable. Other definitions may be used if they are correlated to the definitions set forth. Services other than those defined by § 533.6(d) may be listed and charged for in terminal tariffs pursuant to § 533.6(a).

C. *A Change of Incidence in a Charge does Not Require Separate Approval as a Modification of the Conference Agreement.*

In the *Persian Gulf* case, *supra*, there appears a breakdown of the kinds of conference action which require an approved modification. See also *Continental Nut Co.* v. *Pacific Coast River Plate Conference*, 9 F.M.C. 563 (1966). Application of the tests, reiterated by the Commission in *Persian Gulf Outward Freight Conference*, 10 F.M.C. 61, 65 (1966), in conjunction with the examples used by the Commission, shows that the tariff change here involved was not of the type which requires § 15 approval.

(1) Unlike a dual rate contract, it does not introduce a new scheme of rate combination and discrimination. No rates are combined; no one is discriminated against.

(2) The changing of the identity of the person billed does not represent a new course of conduct, not contemplated by the original approved agreement, unlike prohibition of brokerage on a particular shipment. Strike demurrage has always been assessed in the Port and continues to be assessed. Various charges such as dockage, also reckoned on the weight of cargo, have always been assessed to the vessel. Agreement No. 8785 specifically contemplates changes in the tariff.

(3) In complete contrast to a port equalization system, which contemplates absorption of the difference of inland shipping costs to a loading port more remote from the shipper's plant than nearby ports, the change in our case does not provide new means of regulating and controlling competition.

(4) The uniform tariff in which the present demurrage charge is incorporated does not control competition outside the Terminal Association. This is in contrast to port equalization, which affects third party interests such as the ports and facilities from which traffic is drawn away.

(5) There is no activity which cannot be ascertained from the basic agreement, which comprehensively covers wharf demurrage, usage charges, wharfage, dockage, and all services, facilities, rates and charges incidental thereto.

Of course the tests are to be used with respect to particular fact situations. All revisions of tariffs (other than mere clarifications) represent something "new" in some sense and will have some economic effect. The test is whether the change could be said to be within the bounds of the original agreement. Here, plainly it is. The revision, reducing the rate and assessing the charge to the

vessel along with dockage, results in a more equitable distribution of the burden during longshoremen's strikes. The change is obviously not radical. It lacks the aroma of discrimination and favoritism present in all the arrangements which the Commission has held to require § 15 approval.

This breakdown of items is self-explanatory because in each instance the Commission has by footnote referred to the specific problem that put the situation outside the original scope. They are all more or less directed to the point that, where the approved conference agreement fails to provide effectually for the course of conduct in question, the issuance of the tariff constitutes a modification or enlargement of the original conference agreement which itself must, under § 15, be approved by the Commission.

The Court below (420 F. 2d, at 422; A. vol. I, p. 50) suggested that "Administrative standards cannot be established ex post facto," but the standards in question in this particular area have long been established and, it is hoped, will continue to be clarified in the manner most familiar to our jurisprudence, case-by-case determination. There is no need to fear inconsistency of policy on this question; "if the work has been properly done, there will not be cases looking east and west on similar facts, although, as with the courts, there may be some looking north-northeast or north-northwest as well as due north." Friendly, Definition of Administrative Standards, 75 Harv. L. Rev. 1263, 1295 (1962). Accord, *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, 500 (1958), where the Court noted that it was "by no means clear that the Board and its predecessors have taken uniform and consistent positions in regard to the validity of dual-rate systems under § 14 Third."

In cases such as *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission*, 314 F. 2d 928 (9th Cir. 1963), *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964), and *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (D.C. Cir. 1967), the courts of appeals examined the conference agreements in question to determine whether or not the action taken constituted a modification.

The provisions of Agreement No. 8785 upon like examination will be found to authorize the kind of rate-fixing in issue here. Agreement No. 8785 recites broadly that it is an agreement "by and among the Marine Terminal Operators of the Port of Boston, Massachusetts relative to rates of and charges by the parties for furnishing wharfage, dock, and other terminal facilities . . ." (A. vol. II, p. 5). By Article Third, it covers "the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity" (A. vol. II, p. 6). Article Sixth provides a method of dealing with such matters and further provides for publication and advance notice and filing with the Commission of changes in tariffs (A. vol. II, pp. 7-8).

There is nothing in these provisions to restrict the incidence of the charges under tariffs to that in force at the time of the issuance of the first tariff. On the contrary, the incidence of a charge, like the rate, is left open to future determination.

In the courts below, Transatlantic argued that "wharf demurrage," which is somewhat similar to the strike storage charge here under attack, has generally been considered a charge against the cargo, and that, therefore, a change in its incidence is not "routine" within the language of some of the decisions on the scope of § 15 agree-

ments. The word "routine," however, applies to the character of the change, not to its economic conformity to past practice. The truckloading rates and regulations in *Empire State, supra,* pp. 36-37, were of considerable novelty on the New York piers and engendered as much litigation as the present strike storage charge. Yet the issuance of the tariff itself was "routine" because it was the kind of action contemplated by the approved conference agreement.

Certainly there would be no public advantage in a "narrow interpretation" of the "expansive language" of a terminal conference agreement like Agreement No. 8785. Upon publication of a tariff change under such an agreement, Shipping and any other interested party could file a complaint with the Commission, as in fact they did. Reparations could have been ordered by the Commission if charges had been collected and discrimination or unjust practices had been found under §§ 16 or 17 of the Act. The Commission on its own motion could investigate and enter appropriate orders. In fact, if it found Agreement No. 8785 was being misused, it could revoke its approval of the Agreement.

Moreover, the term "demurrage" in fact does not have the narrow meaning which Transatlantic seeks to impose. Under the Freas formula, demurrage like any other charge should run against the party who is benefitted by the service in question. The present charge, which contains no penal element, is incurred for the benefit of the vessel, since tender of delivery is not complete in the Port of Boston on inbound merchandise until at least the expiration of free time. There is no reason at law or in equity why the charge should not be made against the vessel rather than the cargo owner who cannot remove the goods from the pier.

The Commission itself obviously does not subscribe to the view that demurrage can only be assessed against cargo interests. In the recent decision in *Free Time and Demurrage Charges on Export Cargo*, Docket 68-9, Mimeograph, p. 37 (April 9, 1970), partially printed in 38 U.S. L. W. 2587, the Commission ruled that in the Ports of New York and Philadelphia demurrage on export cargo in the case of cancellation of sailings should be assessed against the vessel rather than against cargo interests.*

**Conclusion.**

The issues raised in this case test the strength of the rulings of the Federal Maritime Commission and affect the conduct of all commerce carried on under F.M.C.-approved agreements. Transatlantic's challenge to the F.M.C.'s decision and to charges made under Agreement No. 8785 amounts to an attack upon long settled principles of administrative law and statutory interpretation.

The District Court correctly and succinctly applied the relevant law to the circumstances. Its opinion preserved the doctrines of administrative finality and, furthermore, correctly ruled that the F.M.C. decision accorded with a proper determination of the substantive questions. The Court of Appeals, however, rejected the F.M.C. decision and misapplied the *VW* case. In doing so, that Court erred.

* The Commission also noted (Mimeograph at p. 32) that in a port like New Orleans, where the carrier in effect leases the pier from the pier operator, demurrage on export cargo is always assessed against the vessel. In that port, the carrier is permitted to pass the charge on to the shipper. "In such cases the vessel is in a real sense responsible for the demurrage, and it does not appear inappropriate for the port to assess it against the vessel."

The appellants, therefore, ask that this Court enter an order reversing the judgment of the Court of Appeals for the First Circuit, and remand the case to that Court with directions to affirm the order of the District Court.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 99

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL., PETITIONERS

*v.*

REDERIAKTIEBOLAGET TRANSATLANTIC

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION AS AMICI CURIAE

### OPINIONS BELOW

The opinion of the court of appeals (App. I, 46–51)[1] is reported at 420 F. 2d 419; that of the district court (App. I, 40–43) is unreported. The opinion of the Federal Maritime Commission (App. II, 49–65) is reported at 10 F.M.C. 409.

### JURISDICTION

The judgment of the court of appeals was entered on January 8, 1970 (App. I, 52). The petition for a writ of certiorari was filed on February 27, 1970, and

[1] "App. I" and "App. II" refer to the two volumes of the Appendix in this Court, which are separately paginated.

was granted on April 20, 1970 (App. I, 53). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission's determination of the validity of a conference tariff amendment, in the exercise of its primary jurisdiction on reference from a district court entertaining private litigation, must be followed in the district court action when there has been no recourse to the exclusive direct review procedures provided by the Administrative Orders Review Act.

2. If the merits of the Commission's determination were properly examined below, whether (as the Commission determined) a tariff amendment shifting the incidence of strike storage charges from cargo to vessel was within the scope of the conference agreement previously approved by the Commission and therefore did not require specific prior approval.

## STATUTES INVOLVED

Pertinent sections of the Administrative Orders Review Act (28 U.S.C. 2341–2352), and portions of Section 15 of the Shipping Act, 46 U.S.C. 814, are set forth in appendix A to this brief, *infra*, pp. 45–52.

## STATEMENT [2]

The Port of Boston Marine Terminal Association ("Terminals") is a conference of marine terminal operators which operates pursuant to Agreement

[2] As discussed more fully in our Memorandum in support of the petition for a writ of certiorari (pp. 2–3), the United States and the Federal Maritime Commission are interested in this private litigation because the decision below raises serious

No. 8785 approved in 1962 by the Federal Maritime Commission under Section 15 of the Shipping Act, 46 U.S.C. 814.[3] The terminal operators are an intermediate link in the transportation chain between carriers, on the one hand, and shippers or consignees, on the other. They perform some services for the carriers and other services for the shippers or consignees. One such service is to furnish a place to store cargo deposited on the wharf for a period of time reasonably necessary for the consignee to remove it. Since the carrier's transportation obligation is deemed to include the furnishing of this service it is done by the terminal operator for the account of the carrier. Five days (excluding Saturdays, Sundays, and holidays) is the period deemed reasonably necessary in the Port of Boston for the consignee to remove import cargo[4] and is known as "free time." Cargo left on the wharf beyond the free time period is held for the account of the consignee, and is assessed a daily storage charge called "wharf demurrage." (App. II, 57–62.)

The Agreement, which relates generally to "rates * * * and charges * * * for furnishing * * * terminal facilities in the Port of Boston * * *" (App. II, 5), provides for joint action by the members of terminals with respect to wharf demurrage and "all

questions concerning judicial review of orders of the Commission and other agencies and concerning the administration of the Shipping Act.

[3] The Agreement is set forth in full at App. II, 5–10.

[4] There are exceptions to this five-day rule that are not pertinent here.

services, facilities, rates, and charges incidental thereto * * *" (Art. Third, App. II, 6). It contemplates the filing of a tariff by the Association with respect, *inter alia*, to wharf demurrage, and requires each member to adhere thereto (Art. Seventh, App. II, 8). In general, the Agreement requires members to file promptly with the Commission their "tariffs, rates, charges, classifications, rules and regulations * * * and any changes therein * * *" (Art. Sixth, App. II, 7).

Following Commission approval of the Agreement in 1962, Terminals filed with the Commission a tariff of agreed rates, charges, and related regulations. With respect to wharf demurrage, cargo remaining on the pier beyond the free time would be assessed a daily charge of 2½ cents per hundred pounds. When factors beyond the control of the shipper or consignee, such as a longshoreman's strike, prevented cargo removal, wharf demurrage would be assessed against the cargo at the reduced rate of 1 cent per hundred pounds (App. II, 52).

In 1964, Terminals revised the tariff so as further to reduce this latter charge, renamed "strike storage," to ½ cent per hundred pounds and to shift the incidence of liability for this charge from the shipper or consignee (the cargo) to the carrier (the vessel). No charge would be assessed when removal was prevented by a strike of terminal employees (App. II, 43, 46, 54–55). The charge would, however, be assessed in the event of a strike by longshoremen, who are employees of stevedoring companies operating under contracts with the vessel owners (see App. I, 38).

When a longshoremen's strike occurred in 1965 and several vessels refused to pay the charge for the resulting strike storage as provided in the amended tariff, Terminals brought an action for damages and declaratory relief against Boston Shipping Association ("Shipping"), an organization representing various vessel owners and agents for vessel owners.[5] The district court (to which the action was removed from the State court where it had been filed) decided that the Commission had primary jurisdiction to determine the issues, raised by Shipping as defenses, concerning the lawfulness and reasonableness of the tariff amendment, and stayed its proceedings to allow Shipping an opportunity to obtain the Commission's ruling on these issues (App. I, 23–24).

Shipping thereupon filed a complaint with the Commission. After full evidentiary hearing and oral argument, the Commission on June 23, 1967 issued a report (App. II, 49) and order (*id.*, 65–66) sustaining the validity of Terminals' tariff amendment under the Shipping Act in all respects here relevant. It held that the amendment shifting the strike storage charge from the cargo to the vessel was within the scope of Terminals' Agreement No. 8785, which had already been approved by the Commission, and so was effective without additional prior approval by the Commission as a new agreement or modification under Section 15 of the Shipping Act (*id.*, 55–57). The Commission further held that it was not an unrea-

[5] Also named as defendants were the members of Shipping, including Furness, Withy & Co., Ltd. (App. I, 9–10), which was respondent's agent at the Port of Boston (*id.*, 26).

sonable practice, within the meaning of Section 17 of the Shipping Act (46 U.S.C. 816), for such charge to be assessed against the vessel for cargo still in "free time" when the strike in question began, that is, cargo as to which the vessel had not fully discharged its transportation obligation (*id.*, 57–59).[6]

Shipping's petition for review of the Commission's order filed on September 19, 1967, more than three weeks after expiration of the sixty-day limit specified in the Administrative Orders Review Act (28 U.S.C. 2341, *et seq.*), was dismissed as untimely by the Court of Appeals for the District of Columbia Circuit on March 18, 1968 (App. II, 67). That court also denied a subsequent petition for rehearing (*id.*, 68).

On September 4, 1968, the respondent here, Rederiaktiebolaget Transatlantic ("Transatlantic"),[7] one of

[6] The Commission ruled that the common carrier's transportation obligation does not end with the deposit of the cargo on the pier. The carrier must also arrange for the consignee to have access to the cargo and sufficient time, *i.e.*, "free time", to remove it. The carrier may contract, as it has in Boston, to have these services performed by a terminal operator, but the obligation remains that of the carrier (App. II, 57–59).

Although the Commission determined that it was not unreasonable for Terminals to assess the strike storage charge against the vessel for cargo which, when the strike began, was still in free time, it held that it was unreasonable to do so as to cargo which was no longer in free time (*id.*, 60–63). The latter aspect of the Commission's decision was not in issue in the district court litigation, since the relevant cargo was still in free time when the strike began.

[7] In our memorandum as *amici curiae* supporting the petition, we referred to respondent as "Swedish", in accordance with the common reference to it as Swedish Transatlantic Line. To avoid confusion, we here use the terminology adopted in petitioner's brief.

the carriers against which strike storage charges had been assessed, petitioned the Commission for reconsideration of its decision, insofar as it held that the tariff amendment was not subject to the prior filing requirement. The petition contended that the decision was inconsistent with this Court's intervening decision on March 6, 1968, in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261 (App. II, 69). Although this was Transatlantic's first participation in this matter in its own name, it specifically claimed, in support of its status as a party eligible to petition, that it had been represented by its agent in the Commission proceedings.[8] The petition was returned as untimely under the Commission's Rules of Practice and Procedure (*id.,* 77). Transatlantic sought no direct judicial review of this action and did not attack it as such below.

Instead, Transatlantic moved for leave to intervene as a defendant in the resumed district court proceedings so as to assert the merits of the argument it sought to present to the Commission (App. I, 26). In support of its motion, it alleged inadequate representation of its interest by its agent (Furness, Withy & Co.) and its liability for a substantial part of peti-

[8] Transatlantic's petition for reconsideration stated that "[i]t is represented in Boston by its Agent, Furness, Withy & Co." and that "Furness, Withy is a member of * * * Shipping * * * which, with its member lines, filed the complaint in this proceeding [before the Commission]" (App. II, 69). The petition further stated that Terminals claims the sums "from Furness, Withy as agent of petitioner under the disputed tariff provisions" (*id.,* 70).

tioner's judgment against Furness, Withy (*id.*, 27-28, pars. 5, 9).[9] It acknowledged not only that it had petitioned the Commission for reconsideration in its own name and by its own counsel, but also that "at all times prior thereto [it] had been represented by counsel for Furness, Withy * * *." (*Id.*, 27, par. 7.) On April 16, 1969, the district court granted the motion to intervene (*id.*, 29).

The district court thereafter rendered judgment against all the defendants (*id.*, 43). After noting that the defendants had not sought timely direct review of the Commission's order and that Transatlantic had sought no review of the Commission's denial of its petition for reconsideration (*id.*, 42), Judge Wyzanski ruled as follows (*ibid.*):

> The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.
>
> Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute

[9] The judgment against Furness, Withy was for the undisputed amount of $10,709 (App. I, 44) and Transatlantic had alleged that it would be required to reimburse Furness, Withy in the amount of $8,155 (*id.*, 27). Transatlantic further alleged specifically that a judgment against Furness, Withy "will be binding on Transatlantic" (*id.*, 28).

or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

Transatlantic alone of the defendants appealed. Concluding that Transatlantic was not "bound" by the Commission's decision, apparently because it viewed Transatlantic as a "non-party" to the Commission proceedings, the Court of Appeals for the First Circuit, per Chief Judge Aldrich, reversed on the basis of a *de novo* consideration of the merits. Reasoning that *Volkswagenwerk, supra,* had undermined the basis of the Commission's decision, the court held that Terminals' tariff amendment was invalid because it was a "modification" of a Section 15 agreement and had not received the Commission's specific prior approval (*id.*, 49–50). Accordingly, the court of appeals directed the district court to enter a judgment for Transatlantic.

## SUMMARY OF ARGUMENT

In deciding that Terminals' tariff amendment was invalid because it had not been filed with the Commission under Section 15 of the Shipping Act, the court of appeals erred in two separate respects: First, the district court (and therefore the court of appeals on review) was precluded from considering the merits of this question because it was a matter for the Commission to decide in the exercise of its primary jurisdiction and the exclusive statutory procedures for direct judicial review of the Commission's decision of

the matter (on reference from the district court) had not been followed. Second, even if the court of appeals did properly reach the merits of the Section 15 question, it decided that question erroneously.

## I

The district court was correct in referring to the Commission—for decision in the exercise of its primary jurisdiction—the question whether the tariff amendment changing the incidence of the charge for cargo storage during a strike amounted to a new "agreement * * * or modification * * * thereof" within the meaning of the Section 15 filing requirement. The question involves matters at the heart of the Commission's regulatory scheme, and therefore familiar principles required that the agency pass upon it in the first instance.

The Commission's decision on reference from the district court resulted in an order subject to direct judicial review under the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.*, having determined a "right or obligation" with direct legal consequences. Further, the Administrative Orders Review Act provided the *exclusive* route for judicial review of the Commission's decision, barring any collateral review in the district court. This is shown not only by examination of the explicit language of the Act but also by consideration of the effect that collateral review in a private action (as here) would have on the statutory scheme: It would be inconsistent with the time limitations upon review and with the requirement that the Commission and the United States be parties, and

could lead to the anomalies of state-court review and review under circumstances that would affect only some, and not all, persons covered by the Commission's order.

Application of these principles of primary jurisdiction and judical review shows the error of the court of appeals' approach and the correctness of the district court's acceptance of the Commission's decision. It is not clear whether the court of appeals regarded the district court (and itself) as free to decide the Section 15 question *de novo* or whether it thought that collateral review was available in the district court action; either approach, however, would be incorrect. To the extent that the court of appeals relied upon the proposition that Transatlantic (the appellant before it) had not been a "party" in the Commission's proceedings on reference, the record shows that proposition to be unsupportable; Transatlantic was in fact fully represented and thus would have no claim that fairness to it required a redetermination of the issues. In any event, there is nothing in the Administrative Orders Review Act that suggests that a non-party is any more entitled to collateral review than a party is, and the mere fact that a litigant in court may not have been a party on a prior reference to an agency does not in any way diminish the agency's primary jurisdiction. At the most, a new party would be entitled to a new reference to the agency, but that should not be necessary where the new party's factual situation is the same as that already considered by the agency; it is plain that the

same issue presented as to Transatlantic was specifically considered by the Commission in this case.

It may be argued that the intervention of this Court's decision in *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, between the Commission's order and the time when the district court was called upon to apply it undermined the continued validity of the Commission's decision. But again—except in the rarest of circumstances, which are not present here—a change in the applicable law could at most lead to a new reference to the agency for reconsideration, and would not justify either collateral review or a *de novo* court decision bypassing the agency's primary jurisdiction. In the circumstances of this case, no such further reference would have been in order because Transatlantic had already sought reconsideration directly from the Commission, and the Commission had determined that Transatlantic had not raised the alleged change in the law with due diligence. Having failed to seek judicial review (as it could have) of the Commission's rejection of its petition for reconsideration, Transatlantic could not reopen that question of due diligence collaterally and in any event has not adequately explained its delay in asserting its contention. Moreover, as we show in part II of the Argument, *Volkswagenwerk* plainly did not affect the applicable law in any manner that would even require reconsideration by the Commission, much less justify the court's reaching an opposite result on its own.

## II

If the Court disagrees with our submission in part I, it must then review the court of appeals' conclusion

as to the merits of the Section 15 question, which we submit was misguided. It has long been established that Section 15—despite its literal coverage of "every" agreement or modification thereof fixing or regulating rates—must be read as excluding conventional tariff changes contemplated by conference agreements (such as Terminals') that have already been approved by the Commission under Section 15; this has been legislatively recognized in an amendment to Section 15. Such an exclusion is necessary to avoid disruption of the regulatory scheme and intolerable delays in the implementation of many of the thousands of tariff changes filed by conferences with the Commission every year. A line must, of course, be drawn between conventional tariff changes contemplated by approved conference agreements and new types of concerted activity not contemplated by those basic agreements, which should receive prior Commission approval. Whether a particular matter is within the contemplation of an approved conference agreement for purposes of Section 15 is a question for the Commission to decide in each instance in the light of its expert knowledge of industry practices and in the context of its own approval of the underlying conference agreement. In this case, the Commission did consider the matter and concluded that a change in the incidence of strike storage charges was the kind of tariff change contemplated in the provision of Terminals' basic conference agreement for the fixing of wharf demurrage charges. That conclusion was sound and should have been accepted by the court below.

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The correctness of the Commission's conclusion was not undermined by this Court's subsequent *Volkswagenwerk* decision. The question there was whether an agreement between carriers and terminal operators relating to labor welfare costs had to be filed with the Commission at all, when there was no underlying agreement among the parties that had been approved by the Commission; thus, the question was whether Section 15 required any kind of Commission supervision of the subject matter of that agreement. In contrast, the tariff amendment here in question was directly contemplated by the approved Terminals agreement and had been filed with the Commission pursuant to the normal procedures relating to supervision of tariffs. The applicability of Section 15 to such tariff changes was not involved in *Volkswagenwerk,* and thus that decision did not affect this case.

## ARGUMENT

### I. THE COURT OF APPEALS' COLLATERAL CONSIDERATION OF THE LAWFULNESS OF THE TARIFF AMENDMENT IMPROPERLY INTRUDED UPON THE COMMISSION'S PRIMARY JURISDICTION AND THE EXCLUSIVE PROCEDURES FOR DIRECT JUDICIAL REVIEW

The court of appeals held that the district court should have decided—as to Transatlantic—whether or not prior administrative approval of the tariff amendment in question was required under Section 15 of the Shipping Act, and that it should have done so without regard to the actual decision that the Commission had just made on this very question on reference from the district court. The court

of appeals acknowledged a single possible obstacle to such a de novo determination by the district court, apparently conceding that Transatlantic would have been bound by the Commission's decision if it had been a "party" to that proceeding; it found, however, that Transatlantic had not been such a "party" and therefore, unlike the other defendants who were members of Shipping, was in no way bound by the Commission's determination of the past obligations created by the tariff.

In our view, this approach was wrong because it improperly ousted the Commission of its primary jurisdiction under the Shipping Act, which carries with it an exclusive scheme for direct review of FMC orders under the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.* The district court had properly referred this very question to the Commission, and had no authority either to ignore or to review the Commission's decision. If—as the court of appeals apparently felt—the Commission's decision was called into question by this Court's subsequent decision in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, that was no excuse for totally ignoring the Commission's decision; at the very least, the Commission should have the opportunity to reconsider. And neither the district court nor the court of appeals on review of the district court had jurisdiction to give plenary review to the Commission's decision; rather, such review had been available only by way of a timely petition for direct review of the Commission's order in a court of appeals pursuant to the

exclusive procedures established in the Administrative Orders Review Act.

Moreover, as we shall show, the conclusion below that Transatlantic was not a "party" to the proceedings before the Commission is inconsistent with the undisputed facts of record. Thus, whatever the situation might be as to one who had no opportunity to argue his case before the agency, Transatlantic has no grounds for avoiding the effects of the Commission's decision and the failure of the vessel owners to seek timely direct review of that decision. And Transatlantic cannot now make any special claim based on the intervening *Volkswagenwerk* decision, having been untimely in its efforts to seek reconsideration by the Commission on this very ground, and having failed to seek judicial review of the Commission's rejection of those efforts.

Accordingly—although we argue in part II of the Argument that the Commission's conclusion on the merits was correct and is unimpaired by *Volkswagenwerk*—we believe that the Court need not consider the merits of the Section 15 question in order to reverse the decision of the court of appeals and reinstate the judgment of the district court.

### A. THE COMMISSION HAD PRIMARY JURISDICTION OVER THE QUESTION WHETHER PRIOR ADMINISTRATIVE APPROVAL OF THE TARIFF AMENDMENT WAS REQUIRED

As part II of the Argument indicates, the question whether Terminals' decision to change the incidence of the strike storage charge amounted to a separate "agreement * * * or modification * * * thereof" subject to the filing requirement of Section 15 of the Shipping

Act (46 U.S.C. 814) is a question of both intricacy and great administrative importance. It involves interpretation of the technical statutory language (which *inter alia*, exempts "tariff rates, fares, and charges, and * * * regulations explanatory thereof * * * agreed upon by approved conferences * * *") in the light of the Commission's fundamental regulatory responsibilities and capabilities, which are broadly affected by the answer given. Such questions as to an administrative agency's scope of authority—though legal questions—have been recognized as questions upon which the agency affected should be allowed to pass in the first instance, that is, questions as to which the courts should defer to the agency's primary jurisdiction, subject only to judicial review. See, *e.g.*, *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 424–425; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 220–223; *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177–178; *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387, 402–404 (concurring opinion) (C.A. 5), certiorari denied, 397 U.S. 910. In a related situation, a court of appeals has held that the FMC "is the properly constituted body to scrutinize the conference action and to determine initially upon which side of the line [*i.e.*, whether within or without an approved basic agreement] the conference action falls * * * taking into account the practicalities of the marketplace and the decisional law on the question from the courts and Commission." *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 339–340 (C.A.D.C.). This Court has explained:

> * * * [B]y preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure * * * [u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised * * *. [*Far East Conference* v. *United States,* 342 U.S. 570, 574–575.]

Thus, there can be no doubt of the propriety—and indeed legal necessity—of the district judge's original decision to refer the Section 15 question to the Commission for its decision. In so doing, he followed precisely the pattern followed in *Volkswagenwerk,* upon which the court below relied primarily for its decision; in *Volkswagenwerk,* the district court in which a suit for recovery of certain charges had been brought referred the question of the lawfulness of those charges to the FMC, and this Court's decision came on direct review of the Commission's decision (while the original district court action remained in abeyance). The question that remains, therefore, is what effect the district court should have given to the agency decision resulting from the reference in the circumstances of this case.

B. THE REFERENCE TO THE COMMISSION RESULTED IN FINAL ORDERS REVIEWABLE EXCLUSIVELY BY THE FILING OF TIMELY PETITIONS FOR REVIEW UNDER THE ADMINISTRATIVE ORDERS REVIEW ACT

The Commission's Report on the complaint filed with it by Shipping following the district court's reference decided, with extensive reasoning, that the

Association's tariff was lawful as to strike storage commencing in "free time" but not as to strike storage beginning later. The resulting agency Order declared that the tariff should accordingly be amended in part but was otherwise enforceable, in particular in the context presented by the present legislation. Thereby the Order plainly determined a "'right or obligation' so that 'legal consequences' will flow therefrom [and was] * * * judicially reviewable" under familiar principles. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 602; *Pennsylvania R. Co.* v. *United States*, 363 US 202, 205; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131, 132, 143. The fact that the Commission's actions were taken pursuant to court referral did not make them, as Transatlantic unsuccessfully contended before the district court, "advisory" only, and thus deprive them of the finality needed for judicial review. "Such review 'is equally available whether [the Commission's] * * * proceeding follows referral by a court or originates with the Commission.'" *Atlantic Coast Line, supra*, 383 U.S. at 602; *Pennsylvania R. Co., supra*, 363 U.S. at 205; *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 18–19. See also *Volkswagenwerk, supra*, 390 U.S. at 266–268.

The Commission's order denying Transatlantic's petition for reconsideration based upon *Volkswagenwerk* was equally subject to direct judicial review. See *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 151 (C.A.D.C.).

The express language of the statutory review scheme governing orders of the Federal Maritime Commission further leaves no room for doubt that the Commission's decisions incorporated in these orders were reviewable *exclusively* by the filing of timely petitions for review under the Administrative Orders Review Act. Section 31 of the Shipping Act (46 U.S.C. 830) stated (and still states) that "except as herein otherwise provided" the procedures governing suits to "enforce, suspend, or set aside, in whole or in part, any order of the [Commission]"[10] shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission.[11]

The procedures for district court review under the Urgent Deficiencies Act (38 Stat. 208, 220) thus incorporated in the statute have been superseded, however, by the Administrative Orders Review Act of 1950, 64 Stat. 1129 (reenacted and recodified in 1966 as 28 U.S.C. 2341, *et seq.* (1964 ed., Supp. IV), 80 Stat. 621–624), which thus now sets forth the procedure for review of FMC orders. See *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 612–614.

[10] The agency entrusted with the duty of administering the Shipping Act has undergone many reorganizations and concomitant name changes since the Act's creation in 1916. For the sake of simplicity the term "Commission" is used herein to include both the present maritime regulatory agency and its predecessors.

[11] The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), and relate solely to enforcement of Commission orders. Sections 29 and 30, respectively, provide for actions in the district courts by the Commission, the Attorney General or a private party to enjoin violations of Commission orders, and suits by private parties to enforce unsatisfied Commission reparation awards.

The Administrative Orders Review Act provides (28 U.S.C. 2342) that the several courts of appeals have "*exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Commission as are specified in Section 31 of the Shipping Act, *supra*. An order can be challenged only by the filing of a petition to review by a party aggrieved within 60 days after its entry (28 U.S.C. 2344); the action is against the United States (*ibid.*), and a copy of the petition must be served on the agency and the Attorney General by registered mail (*ibid.*). The Attorney General is given the responsibility for and control of the interests of the government in all court proceedings under the Act, and the agency is authorized to appear in the proceeding as a party and as of right (28 U.S.C. 2348). Finally, the court of appeals in which the record on review is filed is given the exclusive jurisdiction to make and enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency" (28 U.S.C. 2349).

The express reference to "exclusive" court of appeals jurisdiction in the Administrative Orders Review Act leaves no room for doubt that the Commission is not subject to collateral judicial review in a district court or any other court. Thus, a party to a Commission proceeding is bound by the Commission's decision unless he pursues the statutory procedures for direct review in a timely fashion. *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839; see also *Far East Conference* v. *United States*,

342 U.S. 570, 577. More generally, it would be inconsistent with the entire statutory scheme to make Commission orders subject to any kind of collateral review, whether or not the order in question arises out of a reference by a court.[12] Collateral review long after the expiration of the time limit upon direct review, as in this case, does violence to the policies underlying that limitation. Moreover, it would be wholly inconsistent with the statutory requirements that the United States and the Commission be parties on review of Commission orders if such orders were also subject to review in private litigation without any official notification to the government or any government participation of right. Such collateral review, if it were available, would presumably also be available on the same theory in a state court; the present litigation began in a state court and would have stayed there had the defendants not elected to remove it to the federal district court. But there is no reason whatever to think that Congress ever intended that a state court should have general authority to review decisions of the Federal Maritime Commission and other federal agencies. Compare *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 589–595, 605 n. 9. Finally, this very litigation illustrates another anomaly

[12] With respect to decisions of the Interstate Commerce Commission on reference from a district court or the Court of Claims, Congress has expressly provided for review by the referring court. 28 U.S.C. 1336(b). This provision, which was added by amendment in 1964, long after the Administrative Orders Review Act had come to govern FMC review, suggests that Congress would have expressly so provided in the case of the FMC (or the other agencies governed by that Act) if it had intended to allow such collateral review.

that would apparently flow from collateral review: Transatlantic, having appealed from the district court, is not bound by the Commission's decision, while the other parties in the district court, who did not appeal, apparently are bound; it would be incongruous that collateral review, with fortuitously limited parties, could completely obliterate the Commission's decision, as direct judicial review of course does. The anomalies we have described are especially significant when—as in this case—the agency decision in question relates to broadly applicable regulatory procedures fundamental to the agency's very reason for existence.

### C. THE COURT OF APPEALS ERRONEOUSLY REFUSED TO HONOR THE COMMISSION'S DECISION IN THIS CASE

We have shown that the lawfulness of Terminals' tariff amendment was a question within the primary jurisdiction of the Federal Maritime Commission—which considered it on a proper reference from the district court—and that the Commission's resulting order was reviewable only directly pursuant to the exclusive procedures of the Administrative Orders Review Act. It follows that the determination by the court below that the district court should have decided the question in a way contrary to the Commission's decision was in error, whether (as is not clear) the court considered that the district court and itself were free to decide the question *de novo* or that they should collaterally review the Commission's decision. If the former, the decision below violates the well established principles of primary jurisdiction; if the latter, it violates the exclusive statutory review scheme.

The court of appeals apparently based its conclu-

sion that Transatlantic was not "bound" by the Commission's decision on the proposition that Transatlantic was not a "party" to the administrative proceeding (App. I, 51). While—as we shall discuss—that conclusion would have been wrong even if Transatlantic had not been represented before the Commission, that factual premise is inconsistent with what plainly appears in the record. In the petition for reconsideration Transatlantic filed with the Commission, it asserted in support of its right to petition that it had been represented in the administrative evidentiary proceedings through its agent (p. 7, note 8, *supra*). In support of its motion to intervene in the resumed district court proceedings, it alleged that the representation by its agent was inadequate, again acknowledging expressly that "at all times" prior to the filing of its petition for reconsideration with the Commission it "had been represented by counsel for" its agent (App. I, 27). It acknowledged further that its petition for reconsideration had been filed "in its own name and by its own counsel" (*ibid.*).

Even if Transatlantic was not formally a "party" to the Commission proceedings prior to its belated petition for reconsideration, it can hardly complain that it did not have its "day in court" in the face of its admission that its interests were represented at all times by counsel for its agent. The Commission determined that the tariff amendment was within the scope of the approved agreement, and an attempt to appeal that decision was not timely made. Transatlantic's decision to remain on the sidelines while its agent litigated the issues and lost should not be allowed to deprive the Commission's decision of effect

and put petitioners to the necessity of going through a costly and time-consuming redetermination of the same issues in a new forum. Cf., *e.g.*, *Safir* v. *Gibson*, C.A. 2, No. 34355, decided February 26, 1970, rehearing denied, June 18, 1970; *Oling* v. *Airline Pilots Assn.*, 346 F. 2d 270 (C.A. 7); *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga.).

Even if Transatlantic had in no way been represented in the proceedings before the Commission, that fact would not have entitled the district court (or the court of appeals on review of the district court) to ignore or review the Commission's decision. As to collateral review, there is nothing in the statutory language or scheme that makes the direct review procedures any less exclusive when the person seeking collateral review was not a party to the administrative proceeding. And any suggestion that an agency's exercise of its primary jurisdiction on a prior reference from a court can be ignored when a new party comes along (in the same or subsequent litigation) to raise the same issue is inconsistent with the entire concept of primary jurisdiction.

At the very least, a new presentation to a court of an issue previously considered by an agency should lead to a new reference to the agency, just as the earlier presentation did. But such repeated references of the same issue to the agency would ordinarily be wasteful, and this Court has recognized that there is no need for a reference if the agency involved has "in prior releases or opinions" given an answer to the question that would be referred. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 69. In such a

situation, it is clear, the court should follow the agency's decision *whether or not* the particular party to the lawsuit participated in the agency's proceeding leading up to the decision. The issue is not one of res judicata or collateral estoppel but—as this Court affirmed in *Western Pacific*—one of the "'allocat[ion of] the law-making power over certain aspects' of commercial relations", 352 U.S. at 65. The courts simply are not to decide certain kinds of questions (except on normal judicial review of agency action) and are obliged to seek out and follow the competent agency's decisions of those questions. In terms of the doctrine of primary jurisdiction, the advent of a new party in court would be pertinent only if his factual situation were materially different from that considered in the agency's decision; this is merely another way of saying that the agency's prior decision should be followed without a new reference only if it in fact answers the question presented to the court. But in any event, there is no suggestion in the instant case that Transatlantic's factual situation is in any way different from that of Shipping in general (which initiated the agency proceeding); thus, the Commission had already passed upon the precise question presented by Transatlantic's defense in the district court and on appeal.

There remains for consideration the wholly different question whether in the instant case there was a material change of circumstances following the Commission's order (*i.e.*, this Court's *Volkswagenwerk* decision) that undermined its continued validity. We have no doubt that there may occasionally

be situations in which a change in the law between the time of the agency's decision and the time when a court must apply it would make it appropriate for the court to make a new reference to the agency for reconsideration; the pertinent question would be whether the Commission would (or could properly) now give the same answer as before in the light of the intervening circumstances. But there is no such situation here, for two reasons: first, because Transatlantic did not act with due diligence to seek direct reconsideration by the Commission; and second, because there is nothing in *Volkswagenwerk* that required reconsideration. In any event, there was certainly no justification for the court of appeals to bypass the Commission completely, as it did, on a matter plainly within the Commission's primary jurisdiction. The most it could have done would have been to remand to the district court with instructions to stay the case again while the Commission reconsidered in the light of *Volkswagenwerk*.

With respect to any change in circumstances—whether in the law or in the facts—that might affect the validity of the agency's decision, the party asserting such a change has an obvious obligation to do so with reasonable diligence. Thus, for example, a party to an administrative proceeding has an obligation to assist the agency in making its initial decision on a current record, and equally he has an obligation to seek timely reconsideration by the agency if the new circumstances arise after its decision. He should not be allowed to forego opportunities to seek correction directly from the agency and then attack the

agency's decision when it is about to be applied by a referring court. Transatlantic's attack on the FMC decision in this case was accordingly properly rejected because of its failure to act before the Commission with such due diligence.

As we have described (pp. 6–7, *supra*), the *Volkswagenwerk* decision came in March 1968, some nine months after the FMC decision. However, Shipping took no steps to request the Commission to reconsider at any time, and Transatlantic did not do so until its petition for reconsideration in September 1968, almost six months after *Volkswagenwerk* and fifteen months after the Commission's decision. Understandably, the Commission rejected Transatlantic's petition as untimely, finding no "good cause" to waive the normal 30-day limitation under the circumstances.[13] Transatlantic sought no direct judicial re-

[13] Rule 16(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261) provides: "Within 30 days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration." Rule 1(j) (46 C.F.R. 502.10) provides that such rules "* * * may be waived * * * in any particular case to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." Following the Commission's rejection of Transatlantic's petition on October 8, 1968 (App. II, 77), Transatlantic by letter of October 10 requested the Commission to consider whether "good cause" existed for the late filing in view of the fact that *Volkswagenwerk* was decided after the Commission's decision on the merits. By letter of December 2, 1968, the Commission through its Secretary replied as follows:

> At the time your petition was considered by the Commission, due consideration was given to your contention that good cause existed for filing the petition after the 30-day period specified in the Commission Rules of Prac-

view of this procedural action by the Commission pursuant to the exclusive applicable procedures for judicial review (see pp. 18–23, *supra*). If it had, it could have made any argument in the court of appeals on direct review that it now might seek to make as to an obligation by the Commission to allow reconsideration whenever there has been a material change in the facts or the law. But having let that opportunity pass, Transatlantic is now barred from asserting those arguments collaterally; the matter has already been determined against it. And in any event, we believe that the circumstances justified the Commission's determination that there was no good cause for reconsideration when Transatlantic tardily requested it. Thus, although the district court might have ordered a new reference to the Commission for reconsideration (if the new circumstances justified it, as we shall contend they did not) in the case of a new party, it properly did not in the case of Transatlantic, which had not only been represented at the original agency proceedings but had specifically been denied agency reconsideration for lack of diligence.

Even if Transatlantic's lack of diligence did not preclude an order for further reconsideration by the Commission, the nature of the "changed circumstances" that might be asserted make it plain that a

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tice and Procedure had expired. Nonetheless, the Commission determined that the petition was time[illegible]rred and directed that it be returned.

[This exchange of correspondence, which is contained in Docket 66-28, the official docket of the Commission proceeding here under consideration, is reprinted in Appendix B hereto, *infra*, pp. 53–55.]

further reference would be inappropriate. Before directing a further reference involving, as here, an alleged change in the law, the court would necessarily have to give some consideration to the possible effect of the change in the law on what the agency decided (just as a court must consider the merits of a question to some extent in deciding whether or not it is within an agency's primary jurisdiction in the first place). For the reasons we set forth in part II of the Argument, we believe that *Volkswagenwerk* did not undermine the Commission's decision on Shipping's complaint; therefore no further reference was necessary and the district court properly followed the Commission's earlier decision. In any event, *Volkswagenwerk* certainly did not so obviously negate the Commission's decision as to permit the court to overturn it without even allowing the Commission to reconsider; such action would be appropriate only in the rarest circumstances. At the very most, the court below had authority only to direct a further stay of the district court case pending agency reconsideration, which would then be subject to direct judicial review in the normal course.

II. THE TARIFF AMENDMENT CHANGING THE INCIDENCE OF STRIKE STORAGE CHARGES WAS WITHIN THE SCOPE OF THE BASIC CONFERENCE AGREEMENT AND DID NOT REQUIRE PRIOR APPROVAL BY THE COMMISSION UNDER SECTION 15

As we have shown in the preceding part of the Argument, the Court should reverse the decision of the court of appeals without reaching the merits of its

conclusion that Section 15 of the Shipping Act required Terminals' tariff amendment to be filed and approved by the Commission before it could become effective; at the most, the Court need only consider this issue in a preliminary way in order to satisfy itself (1) that the issue was indeed one within the Commission's primary jurisdiction, and possibly (2) that the *Volkswagenwerk* decision did not so change the applicable law as to require reconsideration of the Commission's earlier decision in this case. If, however, the Court should disagree with our view of the primary jurisdiction and judicial review questions, holding that the court of appeals did properly reach the merits of the Section 15 issue, it must then consider the propriety of the conclusion below on the merits. For the reasons that follow, we believe that the court of appeals misapprehended the merits.

A. CONVENTIONAL CHANGES IN TARIFFS AND RELATED REGULATIONS PURSUANT TO AN APPROVED BASIC CONFERENCE AGREEMENT DO NOT REQUIRE SEPARATE APPROVAL AS "AGREEMENTS" OR "MODIFICATIONS"

In the case of the ordinary conference subject to the Shipping Act, the members typically enter into an agreement by which they agree to act together in setting rates with respect to the subject matter of the agreement—in the instant case, the furnishing of marine terminal facilities and services (App. II, 5-6)—and agree to adhere to the rates (*id.*, 8, seventh) and to file them promptly with the Commission (*id.*, 7, sixth). In a literal sense, every schedule of rates, every tariff, is an agreement as to the rates reached by the members of the conference. And thus

every change in rates, no matter how routine, involves some kind of "agreement" or "modification" by the members.

The basic terms of Section 15 of the Shipping Act require advance Commission approval of "every agreement * * * or modification * * * thereof * * * fixing or regulating transportation rates * * *." Although this sweeping requirement—in effect since the Act was first enacted in 1916—was ultimately qualified in 1961 by an exception for tariff changes that we shall discuss shortly, it has never been susceptible of a literalistic reading, since such a reading would have imposed the impossible requirement that all of the many thousands of changes in conference tariffs agreed upon each year have the Commission's prior approval, with incalculable delays in their implementation.[14] The problem was confronted in Circuit Judge Fahy's opinion for the court in *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C.), certiorari denied, 368 U.S. 931, which (speaking before the exception was introduced in 1961) observed that

> * * * the problem is not solved by a literal reading of some of the language of section 15. It must be solved by considering this language with other provisions of the statute in the light

[14] There were filed with the Commission in each of the last two years a total of almost 300,000 tariff rate changes relating to foreign trade and terminal operations alone. See Annual Reports of the Federal Maritime Commission for 1969 at pp. 18, 31, and for 1968 at pp. 31, 45. The vast majority of these changes are undoubtedly filed by conferences operating under approved conference agreements.

> of a long legislative and administrative history. [291 F. 2d at 338.]

Judge Fahy found significant—and proper—the long and unbroken administrative construction of Section 15 to the effect that conventional changes in tariff rates contemplated by an approved conference agreement are not new agreements or modifications of the conference agreement and do not require separate prior approval under Section 15. *Id.* at 338–339. See *e.g., Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125; *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, 585–586. Noting that prior approval and indefinite suspension provisions would make the Shipping Act much broader than any federal rate regulatory statute, he was reluctant to conclude that Congress intended "a radical departure from its usual approach to [rate] regulation," which would make the statute "unworkable, unless approval were to be merely formal." 291 F. 2d at 339, and n. 8 at 339–340. Moreover, the application of such an across-the-board requirement would, *inter alia,* have obliterated the carefully drawn distinctions between domestic and foreign maritime trades. *Id.* at 340. Finally, Judge Fahy stressed that the Commission's longstanding interpretation of Section 15 had been directly brought to the attention of Congress on several occasions when related legislative questions were under consideration, and Congress had never seen fit to make changes in Section 15 as administratively interpreted. *Id.* at 340–341. He concluded that "[if] a different position is now to be adopted * * * it should be at the hands of Congress." *Id.* at 341.

In 1961, Congress did act. Far from adopting "a different position", it expressly excepted tariff rate changes and explanatory regulations made pursuant to an approved conference agreement from the basic Section 15 requirement, as follows:

> * * * [T]ariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.[14] [75 Stat. 762, 764, 46 U.S.C. 814 (1964 ed.).]

[14] Section 18(b), referred to in the proviso, in terms requires the filing of tariffs only by carriers and conferences of carriers. Hence it might be argued that the exception in the 1961 amendment for tariff filings under approved conferences was intended to apply only to these, and not to terminal conferences. The legislative history, however, reflects no intention to exclude rate changes and related regulations within the scope of *any* approved conference agreements, and there is no reason to apply a stricter standard for a terminal conference than for a carrier conference. The reference was limited to Section 18(b) apparently because there was no statutory or general regulatory requirement that terminal and terminal conference tariffs be filed until October 5, 1965, when the Commission required such filings by General Order 15 (46 C.F.R. 533). Prior to that time, conference terminal operators filed tariffs because the conference agreements, as approved, so required (See App. II, 7, Art. Sixth.)

At any rate, even if the exception in the 1961 amendment were not intended to relate to rates filed pursuant to approved terminal conference agreements, the holding of *Empire State* would apply, thus making unnecessary separate approval of tariff rates within the scope of the conference agreement. See *Agreement No. 9025, Dockage Agreement*, 8 F.M.C. 381, 384.

The amendment was apparently intended to codify the Commission's long and unbroken interpretation, thus allowing without prior filing and approval conventional tariff changes authorized by the basic agreement; it was not, however, intended to cover "new types of concerted activity not contemplated by the basic agreement." Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Cong., 1st Sess., 460–461. See also H. Rep. 498, 87th Cong., 1st Sess., 19–20, paras. (9)–(11); S. Rep. 860, 87th Cong., 1st Sess., 18; *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623, 632, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission,* 334 F. 2d 185 (C.A. 9); *Agreement 7700—Establishment of a Rate Structure,* 10 F.M.C. 61, 66, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 375 F. 2d. 335, 339–340 (C.A. D.C.).

Neither the judge-made rule reflected in *Empire State* nor its substantial codification in the 1961 amendment to Section 15 answers, of course, the question whether a particular conference action is merely a conventional tariff change within the scope of the underlying approved conference agreement or whether it is something more that should have prior Commission approval.[15] In *Empire State,* the court noted

[15] Obviously the general ratemaking authority under an approved conference agreement does not authorize all kinds of concerted activity relating in any way to rates. For example, the Commission and the courts have held variously that it does not authorize the establishment of an exclusive patronage system (sometimes called dual rates) which requires the shipper

the Commission's statement in its brief that "A tariff change and modification of the basic agreement may sometimes be a matter of degree." 291 F. 2d at 339. And, as we have noted, Congress made it clear that the 1961 amendment did not authorize agreements in areas not contemplated by the basic conference agreement to be implemented without prior Commission approval. The question, then, is whether the tariff amendment in question in this case—which is unquestionably in the general area governed by the exception and by *Empire State*—was sufficiently within the contemplation of Terminals' conference agreement. In the following sections we shall discuss this question and the further question of the impact of *Volkswagenwerk,* upon which the court of appeals relied so heavily.

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to employ the conference lines exclusively on pain of being charged higher rates otherwise (*Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C.A.D.C.), certiorari denied, 347 U.S. 990); or a tariff amendment to boycott brokers who deal with non-conference carriers (*Pacific Coast European Conference—Payment of Brokerage*, 4 F.M.B. 696, order enlarged on rehearing, 5 F.M.B. 65, and made permanent, 5 F.M.B. 225); or a device to impose a surcharge to finance an advertising campaign by a shipper's association (*Continental Nut Co.* v. *Pacific Coast River Plate Brazil Conf.*, 9 F.M.C. 563); or a tariff amendment which inaugurates a port equalization system whereby carriers absorb certain inland freight expenses of the shipper (*Pacific Coast Port Equalization Rule*, 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (C.A. 9); or a tariff change providing two levels of rates, one to apply if the cargo were carried on American flag vessels, and a second, lower rate if the cargo were carried on foreign flag vessels (*Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335).

B. THE COMMISSION'S DECISION THAT TERMINAL'S TARIFF AMENDMENT WAS WITHIN THE SCOPE OF THE APPROVED CONFERENCE AGREEMENT WAS REASONABLE AND SHOULD THEREFORE HAVE BEEN UPHELD

Congress created the Commission to provide a forum and arbitrator for the solution of the technical and complex matters involved in the shipping industry. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 485; *Far East Conference* v. *United States*, 342 U.S. 570, 573–576; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607. It committed to the agency's informed judgment wide latitude in formulating appropriate solutions to shipping problems, solutions which "frequently rest upon a complex and hard-to-review mix of considerations," *Consolo*, *supra*, 383 U.S. at 621; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303–304, and hence must be given due deference. *Ibid.*

These admonitions have special relevance to the question whether a particular tariff amendment falls within the authority granted by the Commission under an approved conference agreement. For this question turns largely on the Commission's expert knowledge of industry practices and the context in which its own approval had been given. The lower courts have therefore given the Commission "reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277, 281 (C.A.D.C.). While the issue is sometimes difficult to resolve, the line drawn by the Commission will be respected if its "reading of the basic agreement involved is a tenable one." *Persian Gulf Outward Freight*

*Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 342 (C.A.D.C.). See also *North Atlantic Westbound Freight Ass'n* v. *Federal Maritime Commission*, 397 F. 2d 683, 685 (C.A.D.C.); *Trans-Pacific Freight Conf.* v. *Federal Maritime Commission*, 314 F. 2d 928, 935 (C.A. 9).

The Commission's reading in the instant case is plainly more than "a tenable one." The basic terminals agreement approved by the Commission relates to "rates * * * and charges * * * for furnishing * * * terminal facilities * * *" (App. II, 5). It authorizes the members to act together with respect to "wharf demurrage", *inter alia*, "and all services, facilities, rates, and charges incidental thereto * * *" (Art. Third, App. II, 6) and requires them to file with the Commission their "tariffs * * * and changes therein * * *" relating to wharf demurrage and the other matters covered by Article Third (Art. Sixth, App. II, 7). Terminals, being a link in the transportation chain between carriers and shippers, performs some terminal services for the carriers and others for the shippers, and must allocate the costs of providing these services as between the interests they serve. Indeed, it is obligated to insure that the charges it imposes for the services are properly allocated to the interest—cargo or vessel—for which they are rendered and which derives benefit from them.[16] The

[16] *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, affirmed *sub nom. California* v. *United States*, 320 U.S. 577; *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89; *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57; *Free Time and Demurrage Practices at New York Harbor*, 11 F.M.C. 238; *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525.

Commission, therefore, appropriately found that the authority to allocate the charges between vessel and cargo is comprehended within the authority to fix those charges generally, and no separate advance approval was required.[17]

It is highly pertinent that the determination that *prior* approval was not required by no means freed Terminals' decision to change the incidence of strike storage charges from Commission scrutiny and supervision. All tariff changes must be filed with the Commission and are subject to review either on complaint by an interested party or on the Commission's own motion; such review is to determine whether the amended tariff complies with the antidiscrimination provision of Section 16 of the Shipping Act (46 U.S.C. 815) and the reasonableness requirement of Section 17 (46 U.S.C. 816). Indeed, the Commission gave just such scrutiny to the strike storage allocation in its Report on reference from the district court in this case. And in addition, even if the tariff in question is within the contemplation of the basic conference agreement, the Commission may conclude upon further consideration that the agreement should be modified or approval withdrawn altogether. Thus, in the area of tariffs the fact that Section 15 is not directly appli-

[17] The fact that the conference agreement contains no authority in terms to assess "strike storage" (as the disputed charge was named after the shift in its incidence) as distinguished from "wharf demurrage" is not significant. The only distinction between the two is the interest which is required to pay the charge—the services and facilities offered being precisely the same—and the duty to apply the charge to the proper interest exists irrespective of nomenclature.

cable does not deprive the Commission of meaningful regulatory control appropriate to the situation.

Although prior cases have not dealt specifically with a shift in incidence as opposed to other types of tariff changes, they have involved broad changes in tariff provisions relating to rules and regulations beyond mere changes in the level of rates. Thus, in *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, the tariff changes in question "not only set forth the rates and charges, but define[d] the nature of the terminals' obligations, adopt[ed] rules with respect to their liability, describe[d] the conditions under which other persons might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded." (5 F.M.B. at 585). The Commission held that if rate changes were authorized by the agreement, so were the regulations and practices affecting them. *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, 585. See also the related case, *Empire State Highway Transp. Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336, 338 n. 2 (C.A.D.C.), certiorari denied, 368 U.S. 931. No reason appears for treating the shift in incidence differently from the rules and regulations involved in *Empire State.*

### C. THE COMMISSION'S DECISION IN THIS CASE WAS NOT UNDERMINED BY *VOLKSWAGENWERK*

The court of appeals based its conclusion that the tariff amendment required prior Commission approval upon its reading of this Court's opinion in *Volks-*

*wagenwerk, supra,* 390 U.S. 261. Considering that this Court has held that Section 15 must be read expansively, with exceptions only for "de minimis or routine" cases, the court of appeals concluded that both the Commission's administrative construction of the statute and *Empire State, supra,* had been completely overruled. We believe that this is a misapplication of *Volkswagenwerk.*

The dispute in *Volkswagenwerk* was not, as here, whether collective action, even if within the scope of an agreement previously filed and approved by the Commission, is a new agreement requiring additional approval. There, the issue was whether a particular agreement between carriers and terminal operators, by which they apportioned certain labor welfare costs to meet their obligations under a collective bargaining agreement, had to be filed at all under Section 15. That agreement was in no way even arguably contemplated by any previously filed agreement, and indeed there was no kind of conference agreement of any kind involving all the parties to the agreement. The agreement in question was not reflected in any tariff or other document filed with the Commission—as the amendments here in question were from the start. Thus, the question in *Volkswagenwerk* was whether the "cooperative working agreement" involved was an agreement of the kind that Congress meant to subject to direct Commission supervision. In contrast, there is no question—as we have shown—of the Commission's direct supervision over the type of matter involved in the instant case; the only question is as to the mode of such supervision—that

is, whether the tariff amendment, although contemplated by the basic agreement as already approved by the Commission, is a new agreement or modification requiring further specific approval. The difference between these types of situations is crucial to the administration of the Shipping Act.

To put the matter another way, the purpose of Section 15 is to assure that certain kinds of concerted activities in the shipping industry are not carried out without prior consideration by the Commission to determine that they are not "unjustly discriminatory or unfair", "to the detriment of the commerce of the United States", "contrary to the public interest" or otherwise in violation of the Shipping Act. In *Volkswagenwerk,* the lack of any filing on the subject of allocation of labor welfare costs had deprived the Commission of any opportunity to consider what allocation of these major charges on a continuing basis would best comport with the standards of the Act or how that allocation should be decided upon. Here, on the other hand, the Commission had considered the manner in which wharf demurrage charges would be fixed when it considered Terminals' basic agreement in 1962, and had thereby authorized Terminals to provide for strike storage charges by means of conventional tariff filings subject to Commission review in the normal course under Sections 16 and 17 of the Act. We do not suggest that anything that can be put in tariff form may be implemented without prior Section 15 approval (see pp. 35–36, note 15, *supra*). Rather, the question is whether the matter in question is one within the original contemplation of the

approved agreement; for the reasons given in the preceding section we believe that the Commission properly regarded strike storage charges and their incidence as within the scope of the 1962 Terminals agreement. And there is nothing in *Volkswagenwerk* (which did not involve or discuss the Section 15 exception for tariff changes) that undermines this principle.

## CONCLUSION

For the alternative reasons set forth in parts I and II of the Argument, the judgment of the court of appeals should be reversed and the judgment of the district court should be reinstated.

Respectfully submitted.

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JULY, 1970.

## APPENDIX A

1. Administrative Orders Review Act of 1950, 64 Stat. 1129, reenacted and recodified in 1966 as 28 U.S.C. 2341, *et seq.* (1964 ed., Supp. IV.):

§ 2341. Definitions.

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

§ 2342. Jurisdiction of court of appeals.

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§ 2343. Venue.

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

§ 2344. Review of orders; time; notice; contents of petition; service.

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

* * * * *

§ 2347. Petitions to review; proceedings.

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

§ 2348. Representation in proceeding; intervention.

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

§ 2349. Jurisdiction of the proceeding.

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals

shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

§ 2350. Review in Supreme Court on certiorari or certification.

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

* * * * *

2. Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814 (1964 ed.), provides in pertinent part as follows:

> Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *

* * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

## APPENDIX B

GALLAND, KHARASCH, CALKINS & LIPPMAN,
ATTORNEYS AT LAW,
*October 10, 1968.*

[Formal parts omitted]

Re: Docket 66-28—Petition of Swedish Transatlantic Line for Reconsideration.

FEDERAL MARITIME COMMISSION,
*1321 H. Street, N.W.,*
*Washington, D.C. 20573.*
(Attn: Mr. Thomas Lisi).

GENTLEMEN: This acknowledges Mr. Lisi's letter dated October 8, 1968 stating that, at the Commission's direction, he was returning the above-designated petition for reconsideration for the following reason:

"Inasmuch as the petition was not filed within the period specified in the Commission's Rules of Practice and Procedure, it is time barred."

Your attention is respectfully directed to Rule 16(d) (46 C.F.R. 502.264) of the Commission's Rules of Practice and Procedure which provides as follows:

"Except for good cause shown and upon leave granted, petition to re-open under Rule 16(b) shall be filed with the Commission within thirty (30) days after the date of service of the Commission's final decision or order in the proceeding, unless a shorter period is fixed under Rule 7(c)."

Paragraph 9 of the above-designated petition for reconsideration cited this Rule and urged that petitioner had "good cause" within the meaning of this

Rule for filing its petition after the 30-day period had expired. No mention is made of this contention, and the October 8 letter rejecting the petition makes no finding on whether or not good cause existed for not meeting the 30-day deadline.

Indeed, it appears clear that the rejection of the petition was not contingent upon an automatic application of the 30-day period. The petition was filed on September 4th, but the Commission did not reject it until October 8th. Surely, 34 days is not required to determine whether a pleading is time barred. Furthermore, by letter dated September 17, 1968, the respondent Port of Boston Marine Terminal Association filed a reply to the petition for reconsideration; the reply was rejected by the Commission on September 19, 1968 for the reason that the Commission's Rules do not allow the filing of a reply to a petition for reconsideration unless the Commission grants reconsideration. The September 19 Commission letter did not state that the petition for reconsideration was time barred. If it was not time barred on September 19, no reason appears why it would be time barred on October 8.

Petitioner submits that the October 8 letter stands in violation of Rule 16(d) of the Commission's Rules of Practice. Petitioner respectfully requests that the Commission consider the petition at least to the extent of initially deciding whether, under paragraph 9 of the petition, good cause has been shown within the meaning of Rule 16(d) of the Commission's Rules of Practice and Procedure for not filing the petition within 30 days after the Commission's decision was served. Enclosed herewith is a copy of the original petition which was returned to us with the October 8 letter.

Sincerely,

AMY SCUPI.

DECEMBER 2, 1968.

Mrs. AMY SCUPI,
*Galland, Kharasch, Calkins & Lippman, Attorneys At Law, 1824 R Street, N.W., Washington, D.C. 20009*

DEAR MRS. SCUPI: Reference is made to your letter of October 10, 1968, regarding your petition for reconsideration of the Commission's decision in Docket 66-28.

At the time your petition was considered by the Commission, due consideration was given to your contention that good cause existed for filing the petition after the 30-day period specified in the Commission Rules of Practice and Procedure had expired. Nonetheless, the Commission determined that the petition was time-barred and directed that it be returned.

I am returning the petition which accompanied your letter of October 10, 1968.

Very truly yours,

THOMAS LISI,
*Secretary,*
[*Federal Maritime Commission*].

U.S. GOVERNMENT PRINTING OFFICE: 1970

FILE COPY

NO. 99

FILED
AUG 7 1970
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., *et al.*,
*Petitioners*

v.

REDERIAKTIEBOLAGET TRANSATLANTIC,
*Respondent*

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

## BRIEF FOR RESPONDENT

---

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 99

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., *et al.*,
*Petitioners*

v.

REDERIAKTIEBOLAGET TRANSATLANTIC,
*Respondent*

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

## BRIEF FOR RESPONDENT

---

## QUESTIONS PRESENTED

1. Does a court of appeals lose its jurisdiction under 28 U.S.C. Secs. 1291 and 2106, to review a final judgment of a district court because the Federal Maritime Commission, during a temporary stay of the district court case in which the judgment was entered, ruled that the claim before the district court was not illegal under a regulatory statute?

2. Where the Commission has approved an agreement among competing marine terminals authorizing industry-fixed terminal charges against cargo interests, may the terminals, when the cargo interests resist payment, shift the incidence of such charges to non-assenting ocean carriers without a Commission-approved agreement covering such shift?

3. Can the rights and duties of a steamship carrier with respect to the cargo it carries, set forth in a tariff which a statute renders legally binding, be superseded by a conflicting tariff of marine terminal operators, published pursuant to no official mandate?

## STATUTES INVOLVED

The case involves, in addition to the statutes on which the Petitioners and the Government rely, Secs. 1291, 2106 and 1336(b) of Title 28, U.S. Code, and Sec. 18(b)(1) and (3) of the Shipping Act, 46 U.S.C. 817(b)(1) and (3) which provide:

28 U.S.C. Sec. 1291. *Final decisions of district courts.*

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 2106. *Determination.*

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. Sec. 1336(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

*Shipping Act, § 18(b)(1) & (3).*

(1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively

treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

* * *

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege of facility, except in accordance with such tariffs. . . .

## COUNTERSTATEMENT OF THE CASE

We accept in general outline the statement of the case by Petitioners and the Government, subject to the following additions and exceptions.

*As to Petitioners' Statement* (Brief, 7-18).

1. The trial judge did not permit the defendants to petition the Maritime Commission for determination of "the" issues, but only some of the issues—i.e., whether the plaintiffs' terminal charges were lawful and reasonable under the Shipping Act. (App. I, 23-24). The answer of the original defendants in the district court (App. I, 15-17) and the separate answer of Respondent as intervening defendant (App. I, 29-32) raised other issues not tendered to the Commission or not within its competence. These issues were (a) a contract question as to whether non-assenting vessel operators were bound by the new terminal charges (App. I, 16); and (b) a question whether vessel-operator tariffs, legally binding under the Shipping Act, did not take precedence over conflicting terminal tariffs published without statutory sanction (App. I, 31-32).

2. The terminal "tariff" (Brief, 8) was merely a uniform price list of competitors, sanctioned only to the extent covered by their private agreement, approved by the Commission under Sec. 15 of the Shipping Act, 46 U.S.C. Sec. 814 (App. I, 31, 35-36).[1] Approval conferred antitrust exemption.

3. The agreement of the terminals (App. II, 5-10) was not a general rate-fixing license. Under Article THIRD, it authorized joint action only as to specified matters, and "services, facilities, rates, and charges incidental thereto." The only matter here relevant was "wharf demurrage" (App. II, 6), meticulously defined in the tariff as a charge *against cargo* remaining on a wharf beyond "free time" (App. II, 18), and uniformly defined as a charge against cargo by the Commission as well.[2] The same definition as a charge against cargo was retained in the tariff even after wharf demurrage on strike-bound cargo was renamed in the tariff under the euphemism "strike storage" (App. II, 20), and after the terminals sought to transfer the charge from cargo to vessel (App. II, 43, 42, 46).[3] Petitioners' statement (Brief, 21) that the terms of Agreement 8785 "do

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[1]At the time of the dispute involved here (January-February, 1965–App. I, 12) no statute and no regulation called for the filing of terminal tariffs. Many months later (October, 1965), the Commission issued its General Order 15, requiring that terminal tariffs be filed (46 C.F.R. Sec. 533); but even this order omits any mandate that the terms of such tariffs be observed.

[2]*Storage of Import Property*, 1 U.S.M.C. 676-678 (1937); *Practices of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, 603, 609 (1941), aff'd sub nom., *California v. United States*, 320 U.S. 577 (1944); *Terminal Rate Increases–Puget Sound Ports*, 3 U.S.M.C. 21, 24-25 (1948); *Terminal Rate Structure–California Ports*, 3 U.S.M.C. 57, 58, 78 (1948); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89, 107, 109 (1948); *Terminal Rate Structure–Pacific Northwest Ports*, 5 F.M.B. 53 (1956).

[3]The first tariff under Agreement 8785 was filed to take effect June 15, 1962 (App. II, 12). That tariff defined wharf demurrage as follows:

not themselves specify the incidence of any charges" is thus incorrect, because the charge for wharf demurrage, being the only relevant charge authorized by the agreement, was by definition and official ruling a charge against cargo.

---

> "The term *Wharf Demurrage* refers to the charge levied against cargo remaining on a pier or wharf after the expiration of free time." (App. II, 19).

and, in setting forth conditions applicable to the payment of wharf demurrage charges, stated:

> "Item 4.–*Wharf Demurrage*
>
> D. Wharf Demurrage will be assessed against the consignee of import cargo or the shipper of export cargo as shown on the original manifest or bill of lading. The Terminal may refuse delivery of cargo on wharf demurrage until all wharf demurrage charges are paid.
>
> E. Cargo prevented from removal by factors beyond consignee's control such as strikes, weather conditions, or similar situations affecting the entire Port area:
>
> Per 100 lbs. per day for each day after expiration of free time that the situation exists.–$.01 (App. II, 44).

By a tariff revision effective September 30, 1964, the terminals changed paragraph E of "Item 4–Wharfage Demurrage" to provide that the demurrage on cargo immobilized by strikes would be assessed to the vessel rather than to the consignee or shipper. The charge was still labelled "Wharf Demurrage." The new item provided (App. II, 43):

> "Wharf demurrage assessed on cargo prevented from removal from the Terminal will be assessed to the vessel when the vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel, are on strike."

By a further tariff revision effective December 18, 1964, the terminals (1) further amended paragraph E by changing the words "wharf demurrage" to the words "strike storage" (App. II, 42), and (2) inserted a definition of "strike storage" in the definition section of the tariff which defined that item as a "charge assessed *against cargo* on the pier at the commencement of a strike which prevents receipt or delivery of cargo." (Italics supplied; App. II, 20). Finally, by a tariff revision effective January 21, 1965, the terminals transferred paragraph E from Item 4, titled "Wharf Demurrage", to a new Item 11, titled "Strike Storage." The text was left unchanged (App. II, 46).

*As to the Government's Statement* (Brief, 3-9).

1. The Government persists, in the Commission's tradition, in refusing to quote the language of the terminal agreement which defines its coverage. The Government states (Brief, 3), that the agreement "relates generally to 'rates . . . and charges . . . for furnishing . . . terminal facilities in the Port of Boston. . . .'" That is an expurgated sampling of its preamble. The substantive clause defining coverage, which the Government ignores, is Article THIRD, which provides [App. II, 6]:

> This agreement shall cover the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity.

2. In discussing free time—the period for removing cargo without penalty—the Government states (Brief, 3):

> Five days (excluding Saturdays, Sundays, and holidays) is the period deemed reasonably necessary in the Port of Boston for the consignee to remove import cargo and is known as "free time."

The Government offers no hint as to who deems a five-day period reasonably necessary. That the terminals deem it so, their tariff plainly reveals (App. II, 33). But their tariff, unofficial and non-binding, conflicts with the official, legally-binding tariff of Respondent, which requires consignees to receive their cargo upon discharge (App. II, 78-80).[4] The Commission has no general rule on free time, and no rule at all establishing five days or any other period of free time at Boston. It has, however, ruled that the specification of free time is a carrier, rather than a terminal responsibility.[5]

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[4]The statute which requires ocean carriers to file tariffs and obey their terms is Sec. 18(b) of the Shipping Act, 46 U.S.C. 817(b)(1) and (3).

[5]*Free Time and Demurrage Charges on Export Cargo* (Doc. 68-9)—opinion denying reconsideration, June 30, 1970 (not yet reported). The Commission said (Mimeograph Opinion, p. 5):

## ANOMALIES OF THIS CASE

This case appears to be a one-of-a-kind phenomenon, presenting a liberal sampling of absurdities which flow from uncritical subservience to unexamined dogma. If the contentions of the Petitioners and the Government should lead to a judgment here reversing the court of appeals and reinstating the judgment of the district court–

1. A decision of the Federal Maritime Commission in ostensible conflict with a subsequent decision of this Court (*Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261 (1968)), would stand uncorrected and uncorrectible by judicial process–making the Commission a tribunal of last resort in construing this court's judgment.

2. The district court, in a case presenting issues broader than those referred or referable to the Maritime Commission, would become the Commission's rubber stamp through compulsory adoption of the Commission's decision even if that decision was wrong when made or became wrong in the light of this court's supervening pronouncement.

3. District court issues beyond the Commission's jurisdiction would either be denied adjudication entirely, or would necessitate double appeals–one from the agency and one from the district court–in a mockery of efficient procedure.

4. The court of appeals having jurisdiction to review the judgments of district courts in its own circuit would lose that basic function–raising a question as to why the "primary jurisdiction" of an administrative agency to decide a narrow range of regulatory issues is so far inviolate that it may be invoked to extinguish the primary jurisdiction of

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"Since the obligation to furnish free time is basically that of the common carrier (see e.g. *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888, D.C. Cir. (1962)) to the extent that such carrier adopts and publishes free time regulations, those tariffs rather than any tariffs adopted by terminal operators will be applicable."

courts of appeals to review the decisions of lower federal courts.[6]

The Government suggests (Brief, 15, 28, 30) that a proper disposition of this case might be to order a further district court stay, with a new reference to the Commission for consideration in the light of *Volkswagen*. This contention is made in parallel with a vigorous defense (Brief, 28) of the Commission for rejecting Respondents' petition for reconsideration, filed on that identical ground (App. II,

---

[6]Petitioners and the Government might reply that the Commission decision was controlling only as to issues actually and properly referred to the Commission. The district court, however, drew no such distinction; it treated the Commission's decision as conclusive of the whole case. If, however, the Commission decision leaves some issues open for the district court's resolution, the following results ensue:

(a) The loser before the Commission could appeal to a court of appeals empowered to review the Commission (with a certiorari petition to the Supreme Court also possible);
(b) The result of that appeal would be certified to the district court;
(c) The district court would try the remaining issues and enter judgment;
(d) The loser before the district court could appeal to the court of appeals empowered to review such district court (with a certiorari petition to the Supreme Court also possible).
(e) Judgment would be entered by the district court on the ensuing mandate.

The result would be two trials and two parallel lines of appeal to decide one case, expanding the day-in-court concept to two days in multiple courts—a super-cumbrous litigation formula. Compare Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966).

The theater-of-the-absurd aspect of any such litigating marathon is intensified by the possibility that the appeal from the district court might be brought before the same court of appeals as the appeal from the Commission. In this case, the court of appeals for the first circuit would have qualified to review the Commission on petition of the losing parties because Boston was their business headquarters. (28 U.S.C. 2343). An appeal from the district court would necessarily be heard in the same circuit. Our adversaries do not explain why justice is served by requiring two appeals when one will suffice.

77). The Government thus compounds the anomalies recited above in suggesting reconsideration before the agency which declined—rightly, the Government says—even to receive for filing a reconsideration petition two years ago (App. II, 69-77). What the Government proposes is virtually psychedelic in its twisted logic: a re-filing in 1970 of a reconsideration petition which was too late in 1968.

Another matter overlooked by both the Petitioners and the Government is the absence of effective means to compel further Commission action. Since the Commission is not under review here, and is not a party to the case, this court's mandate will not run against the Commission. The district court could, of course, be directed to stay its judgment while the parties went to the Commission once again. But if the Commission should stand its ground by again declining to reopen, the proceedings would be at a dead halt everywhere.

## SUMMARY OF ARGUMENT

### I.

The Administrative Orders Review Act, 28 U.S.C. Sec. 2341 ff., provides for review of most final orders of the Maritime Commission in a court of appeals. This provision, read literally, means that an F.M.C. order in a case referred by a district court may be appealed to a court of appeals before the case proceeds to judgment in the district court which referred it—and such judgment may again be appealed. Sec. 31 of the Shipping Act, 46 U.S.C. Sec. 830, provides that the procedure to review F.M.C. orders "shall, except as otherwise provided, be the same as in similar suits in respect of orders of the Interstate Commerce Commission."

An I.C.C. order in a case referred by a district court is reviewable by the referring court. 28 U.S.C. Sec. 1336(b). When Congress passed Sec. 1336(b) it recognized that I.C.C.

orders issued in referred cases present the special problem of multiple proceedings, and created a special procedure for its solution. The same problem exists relative to the review of F.M.C. orders, and the policy of Sec. 31 of the Shipping Act dictates the same solution. Section 31, tying F.M.C. procedure to I.C.C. procedure, can and should be read as incorporating 28 U.S.C. Sec. 1336(b).

The district court was not obliged to refer any part of the case to the Commission: the Commission lacked authority to grant the relief which Plaintiffs (Petitioners) sought in court. The Commission therefore had neither primary jurisdiction nor any jurisdiction of the case. The district court's reference was wholly discretionary, and the court was not bound by the Commission's ruling.

II.

Moreover, the Commission order was not reviewable under the Administrative Orders Review Act because it was not a final order. It neither established nor extinguished any rights, having no effect independent of such further action as the district court might take. The agency order was equivalent to a court order denying a motion to dismiss a complaint. Such orders are not final, and are not appealable.

III.

In any event, whatever the effect of the Commission order on the parties to the Commission proceeding, it was ineffective as to Respondent since Respondent was not a party before the Commission. Respondent did not become a party to the court case until admitted to intervention after the Commission proceeding had terminated. Respondent was not bound by the participation of its Boston agent before the Commission: the district court permitted intervention on the uncontested showing of Respondent that such representation was inadequate to protect Respondent's interest. Non-parties are not bound by administrative decisions in adversary proceedings.

IV.

The court of appeals correctly applied *Volkswagen*. It held that a shift in the incidence of wharf demurrage charges from the cargo to the vessel which had carried it could not be disregarded as "de minimis or routine". Change of incidence in the absence of Commission approval is precisely what *Volkswagen* prohibited.

V.

*Volkswagen* aside, the district court erroneously declined to pass on the conflict between the tariff of the terminal association and that of Respondent. Respondent is a common carrier. Common carriers are required by the Shipping Act, Sec. 18(b)(1) and (3), 46 U.S.C. Sec. 817(b)(1) and (3), to file tariffs and to observe their terms without deviation. Such tariffs have the force of law.

The terminal tariff was filed only in accordance with a private agreement among competing terminal operators. Terminal operators are not required by statute to file tariffs, and their tariffs do not have the force of law. Since Respondent's tariff prohibited the payment of the terminal charges for which petitioners sued, and was legally binding, the district court judgment requiring payment of such charges by Respondent was in conflict with the Shipping Act and was properly reversed.

## ARGUMENT

### I. THE COMMISSION ORDER WAS REVIEWABLE BY THE DISTRICT COURT

#### (A) The Interstate Commerce Commission Analogy

In *Pennsylvania Railroad Co. v. United States,* 363 U.S. 202 (1960), this court held that where the Court of Claims had referred to the Interstate Commerce Commission a question as to the reasonableness of railroad rates and the Commission had found them unreasonable, such finding was exclusively reviewable in a district court, by virtue of 28 U.S.C. Sec. 1336, as it then stood. The Court of Claims was held bound to stay its proceedings until the completion of district court review.

Congress reacted to this decision by passing in 1964, at the Attorney General's request, Public Law 88-513, adding to Sec. 1336 (among other provisions) the following paragraph:

> (b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

The Attorney General's letter seeking the amendment explained that under existing law, the reviewing district court would always be a different court from the referring court when the reference came from the Court of Claims, and would frequently be a different court (because of venue restrictions) even when the reference stemmed from a district court. In this connection he referred to "25 cases pending in various district courts while other district courts hear appeals from orders of the Interstate Commerce Commission."[7] He characterized this state of affairs as an "unsa-

[7]Senate Report 1394, 1964 U.S. Code Cong. & Admin. News, Vol. 2, p. 3237.

tisfactory and inefficient procedure"—in derogation of virtually every contention made by the Government here. The Commission's chairman supported the Attorney General, citing *Pennsylvania Railroad* as the source of the problem.[8] The Judicial Conference of the United States added its approval of the Attorney General's solution, viewing the proposal as "a proper one to meet a procedural difficulty which needs correction."[9]

Since the problem which *Pennsylvania Railroad* highlighted and Sec. 1336(b) relieved is identical in principle to the problem here involved, we believe that the amendment and the related legislative history constitute authentic declarations of legislative policy for the court's guidance in this case.

The Government relegates Sec. 1336(b) to a footnote (No. 12, Brief, p. 22) and denigrates its relevance on the ground that it pertains only to the I.C.C. and "Congress would have expressly so provided in the case of the F.M.C. . . . if it had intended to allow such collateral review." We deem this conclusion unperceptive and incorrect.

We do not claim that a statute establishing procedure for one agency applies inherently to another, but we do contend that Sec. 1336(b) in conjunction with Sec. 31 of the Shipping Act (46 U.S.C. Sec. 830) furnishes both reason and opportunity for treating the Maritime Commission and the Interstate Commerce Commission alike in the matter of jurisdiction to review referred issues. Section 31 of the Shipping Act provides:

> The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

[8]Id., p. 3238.

[9]Id., p. 3238.

The Government claims that Sec. 31 was superseded by the Administrative Orders Review Act of 1950, 28 U.S.C. Sec. 2341 ff., and has no further vitality. This court held otherwise in *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), stating (p. 613):

> Section 830 of Title 46 (Sec. 31 of the Shipping Act, 1916, 39 Stat. 738, as amended), in turn, says that, "except as otherwise provided", orders of the Federal Maritime Board are reviewable pursuant to the same procedures as are available "in similar suits in regard to orders of the Interstate Commerce Commission **." Accordingly, if pursuant to provisions in the Interstate Commerce Act a shipper can bring a direct review proceeding to challenge the adequacy of a reparation award issued by the Interstate Commerce Commission, he should be permitted to bring a similar proceeding to challenge the adequacy of a reparation award from the Federal Maritime Commission, subject of course to any special provisions applicable to maritime cases such as the provision in Sec. 2 of the Administrative Orders Review Act that direct review proceedings shall be conducted in the courts of appeals rather than the district courts.

We read this passage as a recognition that even after the Administrative Orders Review Act, the broad Shipping Act policy of parallelism between F.M.C. and I.C.C. review procedures continued in force. The question now presented, as we view it, is whether the questions tendered by the review of referred maritime cases should be answered by literal (perhaps over-literal) application of the Review Act as regards the reviewing tribunal, or by observance of the procedural-uniformity precept of the Shipping Act. As the Attorney General recognized in sponsoring 28 U.S.C. Sec. 1336(b) and Congress recognized in passing it, the referred case presents a special problem and calls for a special solution. While a case which had been referred to the I.C.C. (and reached this court in *Pennsylvania Railroad Co.*) first brought the problem to public notice, the involvement of the I.C.C. rather than some other agency was pure happen-

stance. The solution spelled out in Section 1336(b) was in no sense peculiarly appropriate to I.C.C. cases. It was equally needed and equally workable as regards referred F.M.C. cases and should be applied to them if any provision of law permits such application. In our view, Sec. 31 of the Shipping Act, in view of its strong policy of uniformity, does permit such application in the interest of sane litigation practice. In specific terms, this means the application of 28 U.S.C. Sec. 1336(b) to maritime cases.

Such application, we concede, calls for a measure of reconciliation between a policy enactment pointing one way and a procedural statute (the Review Act) pointing another—an assignment by no means beyond the competence and experience of this court.[10] The statutes here involved comprise a legislative muddle which invites rationalization by this court pending Congressional attention. The muddle and the need for legislative treatment were recognized in *Interstate Commerce Commission v. Atlantic Coast Line*, 383 U.S. 576 (1966) where the court said (note 4, p. 586):

> As is readily apparent from this opinion, the statutory provisions governing this case and the companion case, Consolo, 383 U.S. 607, 86 S. Ct. 1018, are an historical patchwork subject to more than one interpretation. The entire matter is surely ripe for congressional consideration, for it is of continuing significance and the competing considerations of yesterday may not be those of overriding importance today.

In dealing with problems of F.M.C. and I.C.C. review, this court has recurrently accepted the dictates of broad legislative policy over narrow legal literalism where inconsistencies were found among the pertinent statutes. In *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949), the court held that a shipper's suit to review an I.C.C. order denying reparation should, as a matter of policy, be heard by a one-judge district court al-

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[10]See Addison v. Holly Hill Fruit Products, 322 U.S. 607, 620-22 (1944).

though the Urgent Deficiencies Act in terms called for a three-judge court (337 U.S. at 443). The court reasoned that since a one-judge court was provided by statute to enforce an I.C.C. order for payment of money damages, a one-judge court should suffice to review the denial of such an order, although the literal statutory language called for three-judge procedure.

In *Interstate Commerce Commission v. Atlantic Coast Line*, 383 U.S. 576 (1966), this court held that a carrier against whom the I.C.C. had issued a reparation order could not challenge it in an independent review action but could do so by way of cross-action in an enforcement suit instituted by the shipper. The decision, resting in part on Sec. 16(2) of the Interstate Commerce Act (49 U.S.C. Sec. 16(2)), was expressly based on "the policy underlying that section", notwithstanding that Section 17(9) (49 U.S.C. Sec. 17(9)) authorized, without restriction, suits "to enforce, enjoin, suspend, or set aside I.C.C. orders" in accordance with relevant procedural statutes (383 U.S. at p. 589).

In *Consolo v. Federal Maritime Commission*, 383 U.S. 607(1966), the court determined—once more on pure policy grounds—that although a carrier normally could not challenge a reparation order by a proceeding for direct review, he could do so by cross-action in a suit brought by a shipper to review such order as insufficient. The court said that where the shipper was already in the reviewing court, "it would make little sense" to relegate the carrier to a different court (383 U.S. at 616-17). It also cited considerations of "judicial economy and fairness" (Id., n. 14).

Since this court, in the field under review, has commonly deemed itself free to emphasize policy at the expense of interpretative literalism, we ask that it now weigh, against the arguments of the Petitioners and the Government, the policy dictates of the pertinent statutes.

The Administrative Orders Review Act is derived from the Hobbs Act, enacted in 1950 and initially codified in 5 U.S.C. Sec. 1031 ff. Its purpose is shown by House Re-

port No. 2122, 81st Cong., 1950 U.S. Code Cong. & Admin. News, p. 4303) to have been the relief (a) of District Courts from the cumbrous three-judge procedure prescribed for the review of particular types of orders of various agencies, and (b) of the Supreme Court from the burden of passing on appeals taken as of right (rather than by petition for certiorari) from judgments of such three-judge district tribunals (pp. 3304-05). The thrust of the Act was to conserve judicial manpower. Congress had no thought of creating a class of cases in which F.M.C. review would call for more judges than would I.C.C. review–which would be the consequence of a ruling here sending the case back to the Maritime Commission,[11] thence to the Court of Appeals for the District of Columbia (and perhaps this court), thence to the district court for trial of the non-referred issues, thence to the Court of Appeals for the First Circuit (and perhaps again to this court).

If any such judicial whirlabout is required to decide an $8,000 claim for wharf demurrage, it results from the Administrative Orders Review Act, which was enacted solely to save the time and energy of overworked courts and judges–and the bizarre result would prove the law's genius for achieving results at odds with legislative intentions. The sponsors of the Review Act could have had no thought that in substituting courts of appeals for three-judge district courts in agency review matters, they would be doubling or trebling or quadrupling the burden of litigating simple judicial claims with maritime overtones, or rendering the disposition of referred maritime cases permanently more complex than their I.C.C. counterparts.

When this court has found rational grounds for letting one judge do the work of three, it has seized the opportunity to make the one-for-three substitution. In *United States v. Interstate Commerce Commission*, 337 U.S. 426, the court said (p. 443):

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[11] The I.C.C. was covered in the first draft of the Hobbs bill, but was later excluded in deference to the agency's preference for established review procedures.

> We have frequently pointed out the importance of limiting the three-judge court procedure within its expressly stated confines. We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparation orders we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose.

We believe that if this court interprets Sec. 31 of the Shipping Act as incorporating 28 U.S.C. Sec. 1336(b), its decision will be in full conformity with the policy of those two statutes as well as the policy of the Administrative Orders Review Act.

### (B) Primary Jurisdiction

The district judge entered a pre-trial order staying the case to let defendants seek a Commission determination of the lawfulness and reasonableness of "the practices under item 11 of Section III of the plaintiffs' tariff", stating that the Commission "has initial and primary jurisdiction" of such practices. The order called for a report to the court within 60 days, and announced that the court "will retain jurisdiction of the within proceeding". (App. I, 24). The district court defendants then filed with the Commission a complaint which led to the Commission decision set forth in App. II, 49-67. The Commission required an amendment of the terminal tariff in a detail not relevant here (App. II, 64-65) but ruled that as to cargo which had been discharged onto a wharf and was still on free time when immobilized by a strike, demurrage accruing during the strike was lawfully assessable to the vessel rather than the importer (App. II, 61) and that the reallocation of the charge from cargo to vessel did not require approval under Sec. 15 of the Shipping Act because it did not constitute a "new agreement" (App. II, 56). The effect of the decision in terms of the district court's order of "reference"[12]

[12] "Reference" is in quotation marks because the court did not actually refer any controversy to the Commission. It merely stayed the

was merely to determine that the tariff, as here relevant, was not unlawful or unreasonable. The Commission decision, even if binding, settled nothing in the court case except to deprive the defendants of their defense of illegality in the court suit.

The district court, however, said in its opinion (App. I, 40, 42):

> The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C..
>
> Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. . . .
>
> * * *
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> The F.M.C.'s report cannot be regarded as merely advisory. It was a definite decision. And it was a correct one.

We contend that the district court decision was wrong (a) as to the fact of primary jurisdiction, and (b) as to its consequences.[13]

In holding that "The matters presented by the complaint are within the primary jurisdiction of the F.M.C.", the district court omitted to observe that the Commission could not award any part of the relief sought in court. The plaintiffs in court sought a money judgment on a debt (App. I, 11). They could secure no such remedy from the Commission for two reasons: (a) the plaintiffs in court

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case while the defendants sought a Commission ruling on lawfulness and reasonableness.

[13]The court of appeals did not discuss the binding effect of the Commission decision except to say that it could not bind non-parties (App. I, 46, 51)–a point discussed infra, pp. 28-30.

were the *defendants* before the Commission (App. II, 49); and (b) the Commission has no power to enforce debt collections, but only to award reparation for violations of the Shipping Act under Sec. 22 (46 U.S.C. Sec. 821)—of which none were charged against the defendants in the Commission case. See *Prince Line v. American Paper Exports*, 55 F.2d 1053, 1056 (2d Cir., 1932). Moreover, the court case involved issues such as defendants' non-assent to the plaintiffs' charges which were clearly beyond Commission competence. In these circumstances, the court, if privileged to refer the case to the Commission, was not obliged to do so; but having done so, was not bound by the Commission's ruling. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

In *Montana-Dakota*, this court, in a 5-4 decision, declined to order reference to the Power Commission of an issue in a controversy which the majority deemed beyond the Commission's power to afford relief. The court felt that reference in such circumstances would be futile. It said (p. 254):

> If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.

The dissenting judges agreed that neither the court nor the Power Commission could separately grant the relief sought in the court action but felt that relief could be granted by the court through the resources of court and Commission in combination. The dissenting opinion stated (pp. 263-64):

> In a variety of situations we have recently emphasized the principle that courts and agencies "are to be deemed collaborative instrumentalities of justice". United States v. Morgan, 313 U.S. 409, 422

> . . . To that end it is established practice that courts may entertain actions brought before them, but call to their aid the appropriate administrative agency on questions within its administrative competence . . . The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed. See United States v. Morgan, supra; Atlantic Coast Line R. Co. v. State of Florida, supra, 295 U.S. at page 312 . . . We see no reason why the Commission's findings should not be sought here.

The dissenters then observed that it was within the Commission's domain to decide whether the disputed rates were reasonable and if not, what rates would have been reasonable, and added (p. 265):

> The opinion of the Commission, being "only a preliminary, interim step" towards final judgment, would not be a reviewable order under Sec. 313(b) of the Act, but would be reviewed only as a part of the judgment entered by the district court. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 618 . . .[14]

Under either the majority or the dissenting opinion in *Montana-Dakota*, the Maritime Commission's ruling on lawfulness and reasonableness was non-binding on the referring court: under the majority opinion because the case should not have been referred to the Commission since the Commission could not decide it; under the minority opinion because the Commission could merely advise the referring court on a matter within the Commission's competence to consider even though beyond its power to decide.[15]

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[14]Accord: Seaboard Airline Railroad Co. v. United States, 387 F.2d 651, 656 (Ct. Cl., 1967). Cf. United States v. American Union Transport, Inc., 232 F. Supp. 700, 702-3 (D.C.N.J. 1964).

[15]The district court, besides pronouncing the Commission ruling conclusive, said that it was correct (App. I, 42). Comment on the merits was improper:

## II. THE COMMISSION ORDER WAS NOT FINAL AND WAS THEREFORE REVIEWABLE ONLY AS A PART OF THE DISTRICT COURT JUDGMENT.

The Petitioners and the Government insist that the only available relief from the Commission's decision was by petition to a court of appeals under the Administrative Orders Review Act.[16] That act lodges exclusive jurisdiction in such courts only with respect to the review of "final" orders (28 U.S.C. Sec. 2342). The Commission order was, for a variety of reasons, not final.

### A. The Order Neither Established Nor Extinguished Any Rights.

The statute does not specify what kinds of orders are "final" for purposes of exclusive review by the courts of appeals, but several of such courts have considered the question in Maritime Commission cases. In *Howard Terminal v. United States*, 239 F.2d 336, 337 (9th Cir., 1956),

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"Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question." Rochester Telephone Corp. v. United States, 307 U.S. 125, 146 (1939).

[16]This suggestion could not apply to Respondent, since it was not a party to the Commission case: The complainants were members of the Boston Shipping Association (App. II, 49), of which Respondent was not a member (App. I, 36). The Government accordingly claims that Respondent should have sought direct review of the Commission's refusal to accept its petition for reconsideration (Government Brief, 19). The Montship case, 295 F.2d 147, 151, cited to prove that such review was available, is not in point: it involved review of an order entered on reconsideration—not a refusal to reconsider.

The Commission's rules imposed a 30-day time limit which was apparently the basis for the Commission's rejection of the petition. 46 C.F.R. Sec. 502.261. While we believe that in view of *Volkswagen* such limit should have been waived as a matter of discretion (46 C.F.R. 502.10), we know of no authority for appealing because an agency refuses to waive its rules.

the court held that "final" in the Review Act had the same meaning as in 28 U.S.C. Sec. 1291 defining jurisdiction of courts of appeals on appeal from district courts, under which–

> . . . it has long been the rule that the judgment to be appealable "should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved." Collins v. Miller, 252 U.S. 364 . . .

The court thereupon dismissed a petition to review an order of the Maritime Commission which dismissed, without hearing, all but one allegation of a multiple-count complaint charging that certain agreements which had been approved by the Board under Sec. 15 of the Shipping Act were illegal. The court held that the order of dismissal was not final because it had no impact on petitioners since (a) there was no prospect that the agreements would be carried out pending Board action on the one undismissed allegation in the complaint, and (b) petitioners might prevail on that allegation, securing full relief. The court added (p. 338):

> Until petitioner has exhausted the presently pending proceedings before the Board, it is impossible to say that it will not be satisfied by the Board's action.

An identical decision in a closely-related case was made by the Court of Appeals for the District of Columbia Circuit in *Associated-Banning Co. v. United States,* 247 F.2d 557 (1957). And in *Lee v. Federal Maritime Board,* 284 F.2d 577 (9th Cir., 1960), the court refused to review a Maritime Commission order (a subpoena) for lack of finality. The *Lee* court held that an order is final for review purposes only if it "imposes an obligation, denies a right, or fixes some legal relationship which may cause irreparable injury", and concluded that the order in question "does not give rise to such legal consequences because it need not be complied with unless judicially enforced" under specified provisions of the Shipping Act.

Under these authorities, the Commission order here involved was not final because, standing alone, it had no independent effect on anyone. It held only that the defendants before the court (plaintiffs before the Commission) could not (in the Commission's view) defend the court claim on grounds of illegality under the Shipping Act. It did not hold that the court defendants could not defend on other grounds (e.g. non-assent) tendered by the court pleadings, and it constituted no augury as to who would ultimately win the court contest after all the issues were tried. Thus under *Howard Terminal* and *Associated-Banning* it was non-final because it did not dispose of all of the issues and left either side a chance to win or lose in the further court proceedings; and under *Lee*, was non-final because it was inoperative until judicially enforced.[17]

But for the district court's "primary jurisdiction" order (App. I, 23), the court defendants might have elected to raise the issue of tariff illegality by a motion to dismiss the complaint or for summary judgment. An order denying such motion would have been the judicial equivalent of the order entered by the Commission—and would have been non-appealable because orders refusing to dismiss are uniformly treated as non-final. *Southeastern Greyhound Lines v. McCafferty*, 169 F.2d 1 (6th Cir., 1948), *certiorari denied*, 335 U.S. 861; *Garden Homes, Inc. v. United States*, 200 F.2d 299 (1st Cir. 1953); *Upper Mississippi Towing Corp. v. West*, 338 F.2d 823 (8th Cir. 1964). We see no reason why an administrative order which is the equivalent of an order refusing to dismiss should be accorded attri-

[17]Even an order deemed final as against the parties to the case in which it issued would not be final (or operative) against a non-party—and Respondent was a non-party to the Commission proceeding. Moreover, the answer (App. I, 29) which it filed in the district court as an intervening defendant raised issues in addition to those pending before the court when it made its order of reference and when the Commission made its decision.

butes of finality beyond those of a corresponding order issued by a court.[18]

### B. The Commission Order Was Only Contingently Operative.

In the *Rochester* case, (at pp. 129, 130), this court formulated three categories of administrative orders not judicially reviewable. The first category consisted of orders in proceedings–

> (1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.
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> * * *
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> In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.

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[18]The Government cites *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 383 U.S. 576; *Pennsylvania R. Co. v. United States*, 363 U.S. 202; and *Rochester Telephone Corp. v. United States*, 307 U.S. 125 as proving the finality of the Maritime Commission order here involved. In each of these cases, the order under review did what the Commission order here did not do. *Atlantic Coast Line* and *Pennsylvania* involved I.C.C. orders which held particular tariff rates illegal, thus extinguishing the railroads' right to collect them. The F.C.C. order in Rochester commanded a telephone company to obey "previously formulated mandatory orders". 307 U.S. at 144. The Commission order here, in contrast, left the terminals' tariff undisturbed except in one detail not here relevant.

In *Rochester,* the court found that the F.C.C. order before it was reviewable because it commanded specific conduct of a prejudicial nature. But the *Rochester* formula was applied in *East Ohio Gas Co. v. Federal Power Commission,* 115 F.2d 385 (6th Cir., 1940) to reach an opposite result. The court said (p. 388-89):

> The order here sought to be reviewed declares the status of the petitioner as a natural gas company, but such status does not necessarily or immediately carry a direction of obedience to any mandatory order applicable to all having such status . . . The challenged order, therefore, clearly falls into group 1 of the Rochester classification."

The *Rochester* rule was predicated on the contingency of future "administrative" action, but there can be no difference in principle between future administrative action and future judicial action. It was as true in the present case as in *Ohio Gas* that the agency order did not "necessarily or immediately" carry a direction of obedience to any mandatory order. Since no one stood to gain or lose until the court should finally speak, the Commission order lacked the attributes of finality requisite to satisfy the finality test of 28 U.S.C. Sec. 2342 and thereby invest the court of appeals with exclusive reviewing authority.[19]

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[19]The Petitioners (Brief, 24) and the Government (Brief, 18) cite the Volkswagen decision, 390 U.S. 261 (1968) as proving that the procedure they advocate here was correct. This court's decision and that of the Court of Appeals for the District of Columbia Circuit (371 F.2d 747) show that the VW litigation started as a district court suit for the recovery of challenged assessments; that the suit was stayed pending FMC resolution of stated issues; and that the FMC decision was reviewed by the Court of Appeals, and finally by this court on certiorari. Neither opinion shows the terms of the district court's order of reference, and we do not know, therefore, whether the court retained jurisdiction as did the district court here. Whatever the terms of reference, it appears that the VW parties simply walked away from the district court, never to return. No jurisdictional questions were discussed in either opinion and VW cannot be read as a jurisdictional decision. It is possible, depending on what (if any) issues were raised in the district court that the whole VW

## III. PETITIONER WAS NOT A PARTY TO THE COMMISSION PROCEEDINGS AND WAS NOT BOUND BY THE COMMISSION ORDER

As we emphasized in answer in the certiorari petition and Government's *amicus curiae* memorandum supporting it, the court of appeals decision seems to us to be of narrow scope, and discreetly circumscribed to avoid collision with established precepts of administrative review. As to "the binding effect of the [Commission's] *Boston Shipping* decision even though erroneous," the court said merely (App. I, 51):

> We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. See Columbia Broadcasting System, Inc. v. United States, 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise Sec. 18.05. Any other conclusion would destroy the statutory requirement.

The citations for this proposition support it fully. Davis states at the place indicated:

> "Under the traditional rules of res judicata a decision is binding only upon parties to the decision and those in privity with them."

*Columbia Broadcasting* differentiates rules made in the exercise of rule-making power from adjudicatory orders, stating (316 U.S. at 418) that general rules are generally binding–

> Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding . . .

In *National Van Lines v. United States*, 326 F.2d 363, 373 (7th Cir., 1964), the court held that in a railroad suit in court against the Government for recovery of allegedly

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controversy was determined by the FMC. No claim was made that the Commission's VW decision was binding on any non-party.

nwarranted freight deductions, an I.C.C. ruling could be sed as prima facie evidence against the carriers "since both he carriers and the Government were parties to the Commission proceeding." As to carriers not parties to the proceeding, the court held that the I.C.C. ruling served merely s guidance to the court hearing the suit.

The Commission itself held in *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53, 55 that "no order entered in this proceeding may bind terminals which have not been made parties hereto." We assume that a similar rule applies to carriers. See also 5 F.M.B. at 58.

These authorities seem to leave no room to question the ruling that Respondent was not bound by the Commission decision unless, within the Davis formulation, Respondent can be held "in privity" with the parties before the Commission because Respondent's Boston agent, Furness, Withy & Co., was one of them. Such a ruling could be made only by ignoring the purpose of Respondent's intervention in the district court case. Intervention was permitted on Respondent's motion (App. I, 26), resting primarily on Rule 24(a)(2), F.R.C.P., which permits intervention "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." The petition showed that its representation by Furness was inadequate because (a) Furness stood to be indemnified by Respondent for any judgment against Furness and therefore had slight incentive to resist the terminals' claim; (b) Furness had reportedly paid claims on behalf of other principals (diminishing further its incentive to resist) but in what amount Respondent could not ascertain from the defendants' counsel (who was also counsel for Furness); and (c) defendants' counsel missed the filing deadline for appealing the Commission's decision.[20]

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[20] As previously noted, the late filing of a review petition showed deficient representation whether or not a timely petition would have been soundly based.

In these circumstances, Respondent cannot be deemed in privity with any party to either the court or the Commission proceedings. It was thus a non-party to all proceedings until admitted as an intervening defendant before the court in order to protect its previously unprotected interest. The district court's decision that the case stood foreclosed against the intervenor by virtue of the Commission decision was inconsistent with, and totally frustrated, the ruling allowing intervention. Reversal by the court of appeals was clearly correct.

## IV. THE COURT OF APPEALS CORRECTLY APPLIED VOLKSWAGENWERK V. FEDERAL MARITIME COMMISSION, 390 U.S. 261

While Petitioners' incentive to denigrate *Volkswagen* is understandable, the Government's is not.

Section 15 of the Shipping Act gives the Maritime Commission its only tool for regulating rate-making combines and dispensing or denying antitrust exemptions. We should suppose that normal bureaucratic motivation would incite it to maintain close control over the agreements it approves and the exemptions it dispenses. We should similarly expect the federal department which enforces the antitrust laws to insist that exemptions be cautiously conferred and narrowly construed. Here, however, we find the Commission—without even disclosing its text—stretching a narrow rate agreement into a broad antitrust umbrella, and the Government's chief antitrust officer applauding the process as the Commission's lawyer.

The Government's position is in conflict with many precedents of general relevance[21] and most conspicuously with this court's decision in *Volkswagen (VW)*. *VW* was decided after the Maritime Commission had issued its decision but before the case was reactivated in the district court. It was

[21] A representative list is set forth in the Government's Brief, footnote 15, p. 35.

on the basis of *VW* that Respondent moved the Commission for reconsideration (App. I, 26). The motion was peremptorily returned by the Commission (App. II, 77), after which Respondent intervened in the district court and tendered the *VW* issue along with others (App. I, 29). The district court opinion ignored *VW* (App. I, 40) although it had become the major issue in the case.[22]

### A. The Meaning of VW

In *VW*, steamship carriers, stevedoring contractors, and marine terminal operators agreed on a method for assessing charges against themselves to finance a "modernization and mechanization" fund for longshoremen. The carriers, contractors, and terminal operators involved belonged to the Pacific Maritime Association, an employer organization which negotiated contracts with labor unions. In one such labor contract, the Association agreed with the union to create the fund; the agreement as to the method of assessment, however, was not part of the contract with the union. The agreement allocating liability for the assessment provided for varying contributions to the fund for different classes of cargo. Volkswagen claimed that the allocation as to its automobiles was unreasonable. The Commission held that the allocation agreement was not subject to Sec. 15 of the Shipping Act, and the court of appeals affirmed. This court reversed, holding that the agreement allocating liability required Sec. 15 approval whether or not either (a) the agreement creating the association, or (b) the association's agreement with the union, required such approval.

The Petitioners (Brief, 34 ff) and the Government (Brief, 31 ff) seek escape from *VW* by urging that the change in incidence of the terminal rates was within the rule which

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[22]The district court held that the Maritime Commission decision was (a) binding, and (b) correct—paying no heed to the intervention of VW between the Commission and court decisions.

permits "routine" changes in the rates of shipping conferences without securing approval of each new rate. (That rule, long observed in practice, is, and at the date of *VW* was, statute law. 46 U.S.C. Sec. 814; see Government Brief, 34). An identical argument was made and rejected in *VW*. The court said (390 U.S. at 277-78):

> But the agreement with which we deal here–levying $29,000,000 over five years, binding all principal carriers, stevedoring contractors, and terminal operators on the Pacific Coast, and necessarily resulting in substantially increased stevedoring and terminal charges–was neither de minimis nor routine. We hold that this agreement was required to be filed under Sec. 15 of the Act.

The court below said in response to the same contention that "a change in incidence, as distinguished from a change in rate, seems to us anything but routine" (App. I, 51). No other conclusion would have fallen within either the letter or spirit of *VW*, or the ambit of regulatory common sense.

It is true that in this case, Agreement 8785 creating the terminal association, did require approval and was approved. It is likewise true that Agreement 8785 authorized the members to agree upon rates and charges for wharf demurrage. Since, as we show below, wharf demurrage, by historical usage recognized in an unbroken line of Commission decisions (and also by definition in the terminals' tariff) was a charge against cargo, the agreement, when approved, authorized the collection of wharf demurrage from cargo interests–i.e., shippers and consignees. But the authorization of a charge against shippers and consignees is not an authorization of a charge against carriers. When the terminals voted to make carriers liable for obligations which previously ran against cargo, they were making a new agreement respecting the incidence of a financial burden, of precisely the type for which *VW* held that approval is needed.

Under the terminals' initial tariff and a succession of amendments, wharf demurrage was chargeable 100% to the cargo and 0% to the vessel. The further agreement among

the terminals to shift liability for wharf demurrage had the effect of changing liability from 100% to 0% as against the cargo, and from 0% to 100% as against the vessel. A more radical re-allocation could not have been achieved.

The rule calling for filing and approval of agreements fixing or changing the incidence of conference rates is no formal quibble; it is fundamental to the protection of the interested public and the public interest.

When an agreement is filed with the Commission, a summary is published in the Federal Register and the public is permitted to protest or seek a hearing. See *Marine Space Enclosures v. Federal Maritime Commission*, 420 F.2d 577, 581, 587 (D.C. Cir., 1969). Obviously only that portion of the public having a recognizable interest in an agreement as publicly noticed would have reason to respond. An agreement having no discernible effect on carriers ordinarily would evoke no carrier protest. But if an agreement having no ostensible effect on carriers is later invoked, with Commission acquiescence, to fix rates which carriers must pay, the carriers automatically fall victim to a rate combine which they never had occasion to oppose. By this two-stage process of securing approval for an agreement fixing charges for one class of rate-payers and then, without approval, switching them to another, the parties to the rate combine can nullify the only element of protection which the law affords to either public or private interests affected by a maritime rate agreement.[23]

We cannot conceive of a device more efficiently designed to frustrate this court's *VW* mandate. Accordingly we ask the court to rule that *VW* requires Commission approval for the action of the terminal association in shifting the in-

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[23]The Government observes (Brief, 39 - footnote 17) that the only difference between "wharf demurrage" and "strike storage" is "the interest which is required to pay the charge." That is the only difference in most lawsuits between judgment for the plaintiff and judgment for the defendant, but we have not heard from any source but the Government that such difference is insignificant.

cidence of its wharf demurrage charges from cargo to carrier.

If Commission approval of the shift in incidence is needed, the question remains whether it was granted through approval of Agreement 8785; in other words, whether the Commission-approved agreement creating the terminal association provided cover of authority for switching the incidence of wharf demurrage from cargo to carrier. The answer is No.

### B. Scope of Agreement 8785

The Commission held in its Docket 66-28 (App. II, 49) that Agreement 8785 provided cover of authority for the contested change in the incidence of the terminals' wharf demurrage charge, and that the Commission's initial approval of the agreement afforded sanction for the change. Petitioners urge (Brief, 30) that the Commission's ruling be accorded "due deference"; the Government (Brief, 18) praises the Commission for deciding what it decided "with extensive reasoning."

"Due" deference in this case is zero deference because the Commission's "extensive reasoning" was pure sham. In the course of an opinion covering 16 printed pages of the appendix, the Commission never revealed the text it was construing[24]—and neither does the Government in its brief here. Instead of quoting the four lines of type pertinent to its inquiry, it paraphrased them and distorted them in the paraphrase by stating that the agreement covered "all terminal facilities and services" (App. II, 51) when in fact it covered only specified services, and "rates and charges *incidental thereto.*" (App. II, 6; emphasis ours.) The Commission also omitted pertinent reference to any of its many decisions dealing with the incidence of wharf de-

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[24] Article THIRD of Agreement 8785. The complete article is four lines long. (App. II, 6; supra, p. 7)

murrage—each of them calling for a conclusion opposite to the conclusion reached by ignoring them.[25] We submit that a decision formulated by these processes merits a reviewing court's deep suspicion rather than the respect which the Government solicits (Brief, 37) for the agency's "informed judgment" and "expert knowledge".

### 1. *Commission Precedents*

Agreement 8785 (Article THIRD) permits the members of the terminal association to act in concert in establishing rates for the following services: "wharfage; dockage; free time; wharf demurrage; usage charges; passenger charges; water; electricity" and "all services, facilities, rates and charges *incidental thereto.*" (italics ours)

An unbroken line of Commission decisions dealing with and defining marine terminal operations and services, and pre-dating the Commission's approval (1962), had explicitly held that services covered by terminal wharf demurrage charges are services performed not for the vessel interest but for the cargo interest, and that the charges therefor are consequently payable by the cargo interest.[26] These precedents are cited at p. 5, n. 2, supra. In one such case, *Terminal Rate Structure—Pacific Northwest Ports,* 5 F.M.B. 53, 59 (1956), the Commission said:

> "Under tackle to tackle rates, terminals may not assess charges against carriers for services performed or facility usage incurred prior to delivery within

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[25]The Commission did cite two of its decisions (App. II, 55, footnote 7) as showing that it had jurisdiction over allocation of terminal costs between cargo and vessel, but offered no hint that in the same two cases it had recognized wharf demurrage as a charge against cargo.

[26]Contrast, for example, dockage, which is the terminal fee assessed for allowing a vessel to be moored at a berth. This fee is always assessed against the vessel (App. II, 12, 51) which must tie up at a dock in order to perform its obligation to discharge cargo.

reach of ship's tackle or subsequent to delivery at the end of ship's tackle." (5 F.M.B. at 59).

Thus, when the Commission, by approving Agreement 8785, permitted the terminals to agree upon charges for "wharf demurrage", neither the Commission, nor the parties to the agreement, nor the general maritime public, could rationally have conceived that it was authorizing an agreement of the terminal operators which would create in any measure a liability for wharf demurrage on the part of a vessel owner. No service listed in Article THIRD of Agreement 8785 other than "wharf demurrage" is relevant to the disputed charge. There is no mention in Article THIRD of "strike storage," nor would such a term have had any definable meaning under the precedents cited above which defined terminal services and operations.

Until the present controversy arose, the terminals construed their authority to agree upon rates for wharf demurrage consistently with every Commission precedent. They did not construe the authority to agree upon rates for wharf demurrage as allowing them to create a liability against the vessel interest: the tariff filed almost contemporaneously with the approval of Agreement 8785, defining every service covered by Article THIRD of such agreement, specifically defined wharf demurrage as a charge levied *against cargo*. The rate section of that same tariff provided that wharf demurrage would be payable by the "shipper of export cargo and the consignee of import cargo." (App. II, 44).

Thus, until the series of tariff changes inaugurated by the terminals in September 1964, there was no hint that Commission approval of an agreement allowing a group of marine terminal operators to agree upon charges for wharf demurrage could affect in any measure the liability of any vessel operator. The inconsistency of definitions remaining after each tariff change filed by the terminals shows that they were breaking new ground, and were having difficulty in rationalizing the imposition of their new charge against

the vessel for services furnished cargo, within any accepted category of terminal services. Thus while the first and subsequent changes stated that wharf demurrage under strike conditions would be assessed against the vessel, the tariff itself continued to define wharf demurrage as a charge against the cargo. (App. II, 18-19). Moreover, the new charge, even when retitled "strike storage," was placed in the tariff as a sub-category of wharf demurrage, and both strike storage and wharf demurrage were defined in the definition section of the tariff as charges *against the cargo.* (App. II, 42, 18, 20). Finally, when "strike storage" was removed from the wharf demurrage section of the tariff, and given its own section—a change that occurred well after Respondent's ship had departed Boston and free time on the cargo discharged from that vessel had expired—"strike storage" itself continued to be defined as a charge *against the cargo.* (App. II, 20). This series of confusing and ineffectual changes clearly demonstrates that the objective of the terminals to create a vessel liability for services performed for the cargo after its discharge, could not be effectuated without violence to even the terminals' own well-understood definitions of terminal services.

2. *Judicial Precedents.*

Our contention that Agreement 8785 did not cover the contested tariff changes is supported not only by the Commission's decisions but by a long list of court decisions holding that a mere authorization to adopt rates in concert does not provide legal cover and antitrust immunity for activities which reach significantly beyond conventional rates and routine changes upward or downward. A representative list of such cases appears in footnote 15 of the Government's brief. We need not re-cite them here but we do ask the court to observe that even on the Government's summary of their respective holdings, they refute the Government's (and Petitioners') position. *American Export Isbrandtsen Line v. Federal Maritime Commission,* 334 F.2d

185 (9th Cir., 1964) is of special interest for its approbative quotation of the following passage from the Commission's opinion there under review (334 F.2d at 198):

> "As is shown on its face, respondents' present rule, Rule 29, institutes a port equalization plan under which they absorb part of a shipper's inland freight expense equal to the difference between the cost he would incur in delivering the shipment at the loading port nearest the shipment's point of origin in the State of California, and the cost he incurs in delivering it to respondents at a more distant port (Stockton, Sacramento and specified San Francisco Bay Area ports). Respondents thus pay a portion of the shipper's expense in order to induce his cargo to their vessels at the indicated ports.
>
> "The adoption of a plan of this kind does not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as the ports and facilities from which traffic is drawn and it obviously is not 'a pure regulation of intraconference competition'. Port equalization raises questions of possible unfairness, unjust discrimination, and detriment to commerce, all matters included in the standards for adjudging the approvability of agreements under section 15, and may bring into play the requirements of sections 16 and 17 of the Act."

The quoted language is unrecognizable as the work of the same agency which decided Docket 66-28.

Aside from its inconsistency with a long list of court and Commission precedents, the decision in Docket 66-28 possesses the attribute, twice-condemned in recent years, of being "ample in rhetoric but 'sparing in detail'." *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577, 585 (D.C. Cir., 1969); *U.S. Atlantic & Gulf/Australia - New Zealand Conference v. Federal Maritime Commission* 364 F.2d 696, 699 (D.C. Cir., 1966).

The Government (Brief, 39-40) seeks to excuse the Commission's failure to grapple with the problems before it on the ground that failure to dispense preventive justice under Section 15 can be cured after-the-fact by proceedings under other sections of the Shipping Act. The practice of retaining jurisdiction to correct current errors at a future date, as a substitute for correct regulation in the first instance was deprecated in *Marine Space Enclosures*, 420 F.2d at 588. It is no better here than there.

Lastly, the Government retreats to a last-ditch position by suggesting (Brief 27, 30) that this case be remanded to the Commission for reconsideration even though the Commission refused to reconsider when Respondent asked it to do so–a refusal which the Government applauds (Brief, 28). While Respondent would, of course, prefer a remand rather than the reinstatement of the district court decision, we see no possible need for such action. The Commission's errors were clear errors of law, which the Commission refused to examine when asked to do so in the light of *VW* and which, as *VW* makes clear, this court has full power to correct. Courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *VW*, 390 U.S. at 272, quoting *N.L.R.B. v. Brown*, 380 U.S. 278, 291.

## V. RESPONDENT'S TARIFF WAS LEGALLY BINDING AND NULLIFIED THE CONFLICTING TERMS OF THE TERMINALS' VOLUNTARY TARIFF

Respondents' answer (App. I, 29, 31-32) presented to the district court the contention that the terminals' tariff was not legally binding, whereas Respondents' tariff, in conflict with the terminals' tariff, was binding under Sec. 18(b) of the Shipping Act. The district court ignored the issue, in common with all others which Respondent tendered.

Transportation statutes which require the filing of tariffs by common carriers always provide that it shall be unlawful for carriers who must file such tariffs to deviate from tariff terms. The Shipping Act in Sec. 18(b)(1) requires common carriers by water to file tariffs, and in Sec. 18(b)(3) requires that they obey the tariff terms. Compare Intercoastal Shipping Act, Section 2, 46 U.S.C. 844; Interstate Commerce Act, Sec. 6(7), 49 U.S.C. Sec. 6(7); Sec. 217(b), 49 U.S.C. Sec. 317(b); Sec. 306(e), 49 U.S.C. Sec. 906(e); Sec. 405(c), 49 U.S.C. Sec. 1005(c); Federal Aviation Act, Sec. 403(b), 49 U.S.C. Sec. 1373(b). No statute requires the filing of tariffs by marine terminal operators, or adherence to tariff terms. See *Aleutian Homes, Inc. v. Coastwise Line,* 5 F.M.B. 602, 613 (1956).

The district court treated the "tariff" filed by the terminals as if it were the conventional type of tariff, having the force of law, and hence binding on the users of the services it covers. The district court considered its inquiry as to the disputed charge involved here at an end once it determined, as had the Commission, that the charge covered by the tariff was not in violation of specified sections of the Shipping Act. But the tariff is not a conventional type of tariff, and has not the force and effect of law. The tariff was filed with the Commission solely by virtue of the commitment made to each other by the parties to Agreement 8785

that they would report to the Commission the rates upon which they had collectively agreed.[27]

Accordingly, even if the disputed charge were not *per se* illegal, the mere reporting to the Commission of the agreement among the terminals collectively to adopt the charge would not bind any users of the terminal facilities to accept it. Since the vessel operators did not agree (and in fact objected) to the charge (App. II, 16), their obligation would then be determinable solely as a matter of contract law.

Section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. Sec. 817(b)(1) requires common carriers by water in foreign commerce to file a tariff "showing all the rates and charges of such carrier or conference of carriers to or from United States ports and foreign ports . . ." The statute commands that:

> "Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement."[28]

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[27] A Commission General Order was issued *after* the transactions here involved requiring terminals to file tariffs, but not demanding that they be obeyed. 46 C.F.R. Secs. 533.1 ff.

[28] The Commission regulations governing the filing of Sec. 18(b) tariffs specify the contents of tariffs filed pursuant to this section, and provide, in relevant part: "Tariffs shall clearly state all of the services provided to the shipper and included in the transportation rates set forth therein." General Order 13, 46 C.F.R. 536.4(b)(9)(ix).

Pursuant to this statutory directive, Respondent had, as a participating carrier in the Scandinavian Baltic/U.S. North Atlantic Westbound Freight Conference, filed a tariff naming its rates and charges for transportation in foreign commerce between U.S. North Atlantic ports, including Boston, and ports in Europe. The tariff, as required by Sec. 18(b)(1), stated the services covered by the published rates. In relevant part, the tariff provided:

> "The rates in this tariff are port to port rates as customary and unless otherwise specifically stated *do not include terminal or other charges that are for the account of the owner of the cargo.*" (Italics supplied; App. II, 79).

Similarly, Respondent had on file in a tariff its bill of lading which provided that:

> ". . . the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel." (App. II, 80).

Under the tariffs and bill of lading of Respondent, then, the rates and charges which the cargo interest was obligated to pay for Respondent's services did not include any terminal services. Rather, terminal charges were specifically stated to be for the account of the cargo. Cases which hold that tariffs are legally binding on the carriers who publish or participate in them and on their customers as well, are legion. *Montana-Dakota, supra,* stated the rule thus (341 U.S. at 251):

> It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

In *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 833 (5th Cir., 1960). The court said:

> "The tariffs [of air carriers filed pursuant to the Federal Aviation Act] are both conclusive and exclusive; they may not be added to through reference

to outside contracts or agreements or understandings or promises.[15]"

Footnote 15 (omitted here) to the quoted excerpt cited seven Supreme Court and two lower court cases designated as being "among countless cases." The Maritime Commission clearly recognizes this rule (when so disposed). *Ocean Freight Consultants v. Bank Line, Inc.*, 9 F.M.C. 211 (1966).

There is thus no question that Respondent was not required–or permitted–to pay, on behalf of the cargo interest, for terminal services such as wharf demurrage performed beyond ship's tackle. Such payment would clearly constitute a violation of Sec. 18(b)(3) of the Act, which requires common carriers by water in foreign commerce to adhere to the rates published in tariffs and prohibits such carriers from "extend[ing] or deny[ing] to any person any privilege or facility, except in accordance with such tariffs." Even before tariffs in foreign commerce were required, the Commission itself recognized that terminals cannot make an allocation of terminal charges which is inconsistent with the carrier-shipper contract. Where the division of responsibility between carrier and shipper for terminal charges is covered "by express contract between shipper and carrier, as in a tackle-to-tackle contract of affreightment, the terminal's charges must be adjusted to fall on that party for whom, under the contract of affreightment, they have been incurred." *Terminal Rate Structure, Pacific Northwest Ports*, 5 F.M.B. 53, 56 (1956). The conclusiveness of the contract (i.e., bill of lading) when, as here, it constitutes a part of the tariff, was reinforced when the filing and observance of the tariffs of carriers in foreign commerce became mandatory under the Shipping Act.

Respondent contends that even if the terminals' tariff had, like Respondent's, the force of law–which it does not–such a terminal tariff could not change the mutual obligations as between the vessel operator and the cargo interest. But the terminals' tariff does not have the force

of law; it exists merely by virtue of a private contract, publicly approved to confer immunity for actions which would otherwise be *per se* antitrust violations. The basic regulatory scheme of the Shipping Act would be negated if terminal operators, by such agreements, could override public tariffs filed by congressional mandate and statutorily invested with the force of law.

A vessel operator who voluntarily paid wharf demurrage when his tariff excluded it would violate the anti-rebating provisions of section 18(b)(3) of the Act. The identical violation would result from reinstatement of the district court's judgment.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 7, 1970

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# Supreme Court of the United States.

October Term, 1970.

No. 99.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL.,
*Petitioners,*
*v.*
REDERIAKTIEBOLAGET TRANSATLANTIC,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

This reply brief consists of two sections. The first section deals with the argument of Transatlantic that the PBMTA tariff purportedly and improperly supersedes the carriers' conference and tariff and that the Commission did not conclude this issue with finality. The second section deals with what we submit are incorrect recitals of fact in Transatlantic's brief.

### I. The Commission Correctly Ruled that there is No Inconsistency in the Relationships, as Determined by the Commission, between Carrier, Shipper and Terminal. Transatlantic is Bound by that Determination.

The third issue proposed by Transatlantic at page 2 of its brief is: "Can the rights and duties of a steamship

carrier with respect to the cargo it carries, set forth in a tariff which a statute renders legally binding, be superseded by a conflicting tariff of marine terminal operators, published pursuant to no official mandate?" *

Transatlantic endeavors to argue the merits of the question at pages 40-44 of its brief. The argument is that payment by the vessel of the strike storage charges would violate Transatlantic's own tariff and bill of lading. Factually, a reading of these documents will show that no conflict arises. Legally, Transatlantic's position is insupportable, and this is one of the issues which the Commission resolved against the carriers.

Transatlantic's tariff provides that "The rates in this Tariff are port to port rates as customary and unless otherwise specifically stated do not include terminal or any other charges that are for the account of the owner of the cargo" (A. Vol. II, p. 79).

To begin, the carriers' tariff specifies rates charged by the carriers and conditions for cargo between the ports in question (A. vol. II, p. 78). It prescribes terms for users of the service provided *by* the carriers. It does not purport to prescribe terms for those who, like the terminals, are providing service *to* the carriers. Those terms, in the order of things would be native to the tariffs of those providing such service.

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* It might appear at first reading that this issue is not clearly within the grant by this Court of the writ of certiorari, *Irvine* v. *California*, 347 U.S. 128, 129, and hence might be passed over by the Court. See *Local 1976, United Brotherhood of Carpenters &c.* v. *NLRB*, 357 U.S. 93, 96, fn. 1; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428-429. But the issue was one within the competence of the Commission. See 46 U.S.C. § 821: "Any person may file with the Federal Maritime Board a sworn complaint," &c. We therefore deal with the question as one that should be dealt with by this Court as under the initial issue posed by certiorari—*i.e.*, whether the Commission's order could be collaterally attacked. Later in this section we show that this issue was decided by the Commission.

The tariff of the vessel, clearly, does not mean the vessel is not bound to pay charges of terminals for the account of the vessel. In fact, the vessel is always obliged to the terminal for dockage charges, which, it may be assumed, are absorbed. The vessel is also liable, where the tariff of the terminal so requires, for wharfage. *Boston Shipping Association Inc.* v. *Port of Boston,* 11 F.M.C. 1 (1967). The vessel further pays the cost of clerks, who do paper work on cargo after discharge at point of rest, cost of cargo watchmen, and cost of insurance while goods are on the pier (A. Vol. II, pp. 52-53).*

The terminal, subject to review by the Commission and the courts, decides which interest will pay the several charges, based on who has the benefit of the service.

The discussion by Transatlantic at pages 40-44 seems to assume that payment by the vessel of strike storage charges would obligate the vessel to charge its customer. This is a complete misapprehension. The storage of cargo during a longshoremen's and clerks' strike is for the benefit of the vessel which has not yet completed its service. The service includes free time. Conceivably under the terms of its bill of lading, the whole of which is not in the court record, but which was in the record before the Commission (A. Vol. I, p. 38, par. 15(b)), the vessel *could* pass the charge on to its customer. See *International Packers, Ltd.* v. *Federal Maritime Commission,* 356 F. 2d 808 (D.C. Cir. 1966). But that question is not before the Court. The question is rather the right of the terminal to charge the vessel. Payment of such charge is not in any way an enlargement of the vessel's tariff.

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* The vessel in New York is also assessable for the cost of moving import cargo from place of rest to truck tailgate. *Truck Loading and Unloading Rates at New York Harbor,* F.M.C. Docket 65-46 (Mimeograph, Sept. 18, 1969).

The flaw in Transatlantic's argument is that it mistakenly assumes that an affirmance of this shift in charge will require a change in its own rates in violation of its tariff. While the respondent may desire to increase its rate, nothing in this case remotely requires it to do so. Procedures exist by which the vessel interest may seek approval of a change in rate deemed economically desirable. There is nothing in itself illogical in charging the vessel for wharf demurrage.

> "*Free Time and Demurrage Charges on Export Cargo*, F.M.C. Docket No. 68-9 (Mimeograph, April 9, 1970), at p. 37. "As the Examiners found, the assessment of demurrage against the vessel in cases of vessel cancellation or delay also accords with the practice in many ports." Compare 46 C.F.R. part 541, 35 Fed. Reg. 6276, postponed at p. 10,858.

Transatlantic also relies on language in its bill of lading to support its argument that an affirmance of the District Court decision would require a violation of its own tariff. The respondent cites (Brief, p. 42) the following provision:

> ". . . the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel."

Transatlantic uses this language, in conjunction with its tariff, to support its conclusion that "the rates and charges which the cargo interest was obligated to pay for Respondent's services did not include any terminal services. Rather, terminal charges were specifically stated to be for the account of the cargo" (Respondent's brief, p. 42).

As shown above, Transatlantic's tariff does not prevent the assessment against vessels of charges of terminals where the vessel is the user or beneficiary of the service (A. Vol. II, p. 17). Presumably the respondent considers such charges of terminals in its rate-setting. As a matter of fact, then, the tariff and bill of lading language does not prevent the payment by vessels of any charge of terminals.

From this misreading of its own tariff and bill of lading, Transatlantic goes on to offer an erroneous legal interpretation of its obligations under its tariff and bill of lading. In essence, the respondent holds that its liability for charges ends when the cargo is freed from ship's tackle and set upon a pier.

This very argument was made to the Commission which had Transatlantic's own bill of lading in evidence before it (A. Vol. I, p. 38). The Commission's reaction to the argument deserves extensive quotation:

> "Complainants' simplistic characterization of a common carrier's duty as the 'duty to carry' does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a 'reasonable pier.' The carrier must also 'tender for delivery' which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd.* v. *Federal Maritime Board,* 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.
>
> "In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the con-

signee to accept delivery. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities. *Intercoastal Rates to and from Berkely*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports, supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practice—Port of San Diego*, 9 F.M.C. 525 (1966).

"At Boston, 'free time', or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents [petitioners here]. The obligation to provide free time and effective facilities to make that free time meaningful and realistic remains the carrier's, At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper." (A. Vol. II, pp. 58-59.)

. . . . . .

"That the [strike storage] services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object

being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the 'vessel' and those performed for the 'cargo'. While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo. Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue. We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. *Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.*" (A. Vol. II, pp. 60-61.) (Emphasis added.)

Thus, apart from a grammatical analysis of the tariff language which shows no conflict, the Commission decision establishes the same point as a matter of law. Indeed, so far from the shift in incidence of strike storage charges creating a conflict with the respondent's tariff, it is entirely

fair and reasonable that the charge fall on the vessel, not because an arbitrary turn of the wheel says so, but because Transatlantic's tariff and bill of lading contemplate it as part of the duty to deliver.

Transatlantic's argument on this point is, as the Commission said, "simplistic." Furthermore, in view of the Commission's discussion of the issue, as quoted above, it is astonishing to find Transatlantic informing the Court that this issue was "not tendered to the Commission or not within its competence" (Respondent's brief, p. 4). The issue was both tendered to the Commission and decidedly within its competence.

We do not overlook a slighting prefatory statement in Transatlantic's argument at page 40 that "The district court ignored the issue, in common with all others which Respondent tendered." The issue was presented to the District Court in Transatlantic's memorandum (A. Vol. 1, p. 7), and the District Court considered Transatlantic's various contentions and found them to have "no merit" (A. Vol. I., p. 42). Whether the judge was right or wrong, the suggestion that he ignored every point raised by a party offers gratuitous offense. We submit that the judge was entirely right, and that consideration of the reasoning in Transatlantic's brief shows that he properly dealt with the point on a summary basis.

## II. Transatlantic's Brief Misstates Several Facts or Points.

The final function of this reply brief is to correct various misstatements of fact which appear in Transatlantic's brief. Some have been touched on in the earlier discussion and will be briefly mentioned here.

1. On page 4 of its brief, Transatlantic states that only "some of the issues" in the case went to the Commission,

citing the contract question and the tariff question (discussed in Part I). As a matter of fact, no contract question was pleaded, nor was any evidence bearing on such a question offered. The tariff question, on the other hand, was both tendered to the Commission and within its competence. So much of the respondent's argument which rests on these misstatements of fact must therefore be discounted.

2. On page 5 of its brief, Transatlantic implies, in two places, that the terminals' tariff existed as a private agreement prior to the approval of Agreement No. 8785. In fact, the Agreement, as approved, took effect February 26, 1962 (A. Vol. II, p. 5). The tariff, however, was not issued pursuant to the Agreement until June 15, 1962, as Transatlantic itself stipulated at trial (A. Vol. I, p. 36.)

The purpose of Transatlantic's attempt here to imply that the tariff pre-dated the Agreement is to use the tariff to define certain terms used in the Agreement. This purpose is shown, on page 5 of the respondent's brief, where Transatlantic identifies "wharf demurrage" as used in the Agreement and defined in the subsequent tariff, with "strike storage" as used in the tariff, and then imports into the Agreement from the tariff an absolute definition of both charges as the responsibility of cargo. From this confusion thrice-confounded, the respondent emerges to announce (Brief, pp. 5-6) that "the petitioners' statement . . . that the terms of Agreement 8785 'do not themselves specify the incidence of any charges' is . . . incorrect . . . " The Agreement itself (A. Vol. II, pp. 5-10) is the best evidence of what it provides. A reading will show that it does "not specify the incidence of any charges." The specification of charges was not made until five months later. Transatlantic's attempt to make the tariff terms control the Agreement apparently arises from failure to read the documents with care.

3. More misstatements of fact appear on page 7 of Transatlantic's brief where it is said that the Government "in the Commission's tradition" refuses to quote and, indeed, "ignores" Article Third of Agreement 8785. In fact, the Commission referred to Article Third in its decision (A. portions on pages 3 and 4 of its brief.

4. Also, on page 7 of its brief, Transatlantic refers to the PBMTA tariff as "unofficial and non-binding." The stipulation of facts signed by Transatlantic's counsel (A. Vol. I, p. 36) specifically asserts that the "tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785." If such a tariff is "unofficial," then a distinction between "official" and "unofficial" tariffs is meaningless. So also with the assertion that the tariff is "non-binding." If the tariff is non-binding, then what is its reason for being? It surely binds the terminals and those who use their facilities. It binds the respondent to pay dockage fees. And, with respect to free time, the terminals have the right to establish free time periods as clearly indicated by the quotation from *Free Time and Demurrage Charges on Export Cargo* (Doc. 68-69), cited in note 5 on pages 7-8 of Transatlantic's brief.

5. At page 33 of its brief, Transatlantic argues that the requirement of approval under § 15 is in the public interest because the "public is permitted to protest or seek a hearing." This contention assumes that without such a requirement there would be no opportunity to make such a protest.

On the contrary, Agreement No. 8785 specifically provides for notice to the public before changes become effective (A. Vol. II, p. 8). No change can become effective on less than 30 days' notice unless good cause exists for shorter notice. In the latter case, which did not arise in the case at bar, reasons for shorter notice must be forwarded to the Commission. *Ibid.*

In the case before the Court, there was plenty of opportunity for Shipping and Transatlantic to complain to the Commission. As early as September 29, 1964, months before the ILA strike, Shipping notified PBMTA of objections to the tariff change (A. Vol. I, p. 17). As the Commission found, in the months following September, 1964, two or three meetings took place, which ended with the parties still at odds (A. Vol. II, p. 54). PBMTA told Shipping that it would assess the charge against the vessel but that if there was any complaint to file it with the Commission. *Ibid.* In fact, PBMTA had to make a motion in the District Court more than a year later, to demonstrate this opportunity.*

On the adequacy of Commission procedures, see elaborate discussion in *Agreement, No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965), quoted at length in our original brief at p. 39.

6. At three points in its brief, Transatlantic cites and relies on *Terminal Rate Structure-Pacific Northwest Ports,* 5 F.M.B. 53, 59 (1956). See pp. 5, 29, 35 and 43. We referred to this case at page 39 of the PBMTA brief. Transatlantic's citation omits the subsequent decision on rehearing in 5 F.M.B. 326 (1957), in which the Federal Maritime Board specifically ruled that "in every case the terminal operator may bill and collect from the vessel, and in instances where the charges are incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee."

* Ironically, even after Shipping had filed its complaint with the Commission, Shipping, according to the Commission's report (A. Vol. II, p. 55, fn. 7), "contended that we were without jurisdiction."

## Conclusion.

For the reasons stated herein and in our main brief, the petitioners submit that the judgement of the Court of Appeals for the First Circuit, should be reversed, and the case be remanded with directions to affirm the judgment of the District Court.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## PORT OF BOSTON MARINE TERMINAL ASSN. ET AL. *v.* REDERIAKTIEBOLAGET TRANSATLANTIC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 99. Argued October 22, 1970—Decided December 8, 1970

Petitioner Terminal Association, a maritime terminal operators conference operating under an agreement approved by the Federal Maritime Commission (FMC), pursuant to § 15 of the Shipping Act, 1916, revised a tariff on file with the agency by shifting the incidence of a wharf demurrage charge from consignees to carriers. When several carriers refused to pay the revised charge, which had not previously been approved by the FMC, the Terminal Association sued the association that represented them and their agents (Shipping Association). The District Court stayed the proceedings to allow the Shipping Association to obtain from the FMC a ruling on the validity of the change. After a hearing, the FMC concluded, on June 23, 1967, that its prior approval of the revised tariff was not necessary under § 15 of the Act. On September 19, 1967, the Shipping Association filed with the Court of Appeals a petition of review which that court dismissed for lateness. On September 4, 1968, respondent, a carrier that had been assessed charges, made application to the FMC for reconsideration (on the basis of a decision this Court rendered after the FMC's ruling), which the FMC returned as untimely filed under its rules. Thereupon respondent, contending that its agent had inadequately represented it in the proceeding brought by the Shipping Association, sought and was allowed to intervene in the still-pending action in the District Court. That court, concluding that the FMC had primary jurisdiction of the subject matter of the dispute and that the District Court did not have jurisdiction to review the FMC's decision, rendered judgment against the Shipping Association and respondent. Respond-

Syllabus

ent appealed. The Court of Appeals reversed on the merits, after concluding that respondent was not a party to the FMC proceeding and was therefore free to seek independent collateral review in the District Court of that agency's order. *Held:*

1. The FMC, the agency responsible under the Shipping Act for supervising conferences of marine terminal operators and uniquely qualified to consider disputes involving overall conference policies, had primary jurisdiction over the question whether prior administrative approval of the tariff amendment was required. Pp. 5–6.

2. The District Court correctly concluded that it had no authority to review the FMC's decision, which constituted a final order and as such, under the Administrative Orders Review Act, was exclusively reviewable by the Court of Appeals. Pp. 6–8.

3. Respondent, having been represented by its agent in the administrative hearing and having also had every opportunity to participate before the FMC and to seek timely review in the Court of Appeals, cannot collaterally attack the FMC's order. P. 9.

4. When the case returned to the District Court, the time for review by the Court of Appeals had expired, precluding any judicial review on the merits of the FMC decision. P. 9.

420 F. 2d 419, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 99.—October Term, 1970

Port of Boston Marine Terminal Association et al., Petitioners, v. Rederiaktiebolaget Transatlantic. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[December 8, 1970]

Mr. Justice Marshall delivered the opinion of the Court.

The underlying dispute here is whether vessel owners or consignees will pay charges [1] for cargo left on the wharves at the Port of Boston. But the central question we face is whether a resolution of this dispute by the Federal Maritime Commission is binding on respondent. We believe that the Court of Appeals was in error in holding that the Commission's determination was not binding. Accordingly, we reverse.

The Port of Boston Marine Terminal Association is a conference of maritime terminal operators acting pursuant to an agreement [2] approved in 1962 by the Federal Maritime Commission.[3] Prior to 1964, the Terminal

[1] The charge involved is "wharf demurrage," the charge assessed when cargo remains on the pier or wharf after five days, the free time at the Port of Boston. See n. 5, *infra*.

[2] Agreement No. 8785. The agreement set out the basic scheme for the protected price-fixing engaged in by the terminal operators.

[3] See § 15 of the Shipping Act, 46 U. S. C. § 814.

Association administered a tariff,[4] on file with the Commission, which assessed charges against a consignee whenever cargo remained on a pier or wharf for more than five days.[5] In that year, the Terminal Association, without prior approval of the Commission, shifted the incidence of the tariff so that a daily fee of one-half cent per 100 pounds was charged a carrier-vessel whenever the failure to remove cargo resulted from a strike by longshoremen.

In 1965 there was a longshoremen's strike that caused cargo to be left on the wharves beyond the five-day—free time—limit. Several vessels refused to pay the revised charges; and the Terminal Association brought a state court action for damages and declaratory relief against the Boston Shipping Association,[6] an organization representing vessel owners and their agents. Following removal to the United States District Court, the Shipping Association defended on the grounds that the revised tariff was not within the scope of the 1962 Terminal Association agreement and could not become effective without Commission approval.[7]

The District Court stayed the proceedings to allow the Shipping Association to obtain a ruling by the Commission on the validity of the change. On June 23,

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[4] The basic wharf demurrage charge was assessed against the consignee at a daily rate of 2½ cents per 100 pounds. Under the pre-1964 tariff, if factors beyond the control of the consignee or shipper prevented cargo removal, wharf demurrage would be assessed against the consignee at a daily rate of 1 cent per 100 pounds.

[5] When cargo is brought to the wharf it is considered reasonable for there to be a delay of up to five days before the cargo is loaded on the vessel or taken away by the consignee.

[6] The members of the Shipping Association, including Furness, Withy & Co., Ltd., Transatlantic's agent at the Port of Boston, were also named as defendants.

[7] See *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U. S. 261 (1968).

1967, after a full evidentiary hearing, the Commission issued a report and order concluding that prior approval was not necessary because shifting the incidence of the charge did not "constitute a new agreement or a modification to the existing agreement calling for a new . . . rate-fixing scheme not contemplated in the original agreement." [8] The Commission also approved the change in the fee structure insofar as the change affected cargo that was in free time when the strike started but held that it was unreasonable within the meaning of § 17 of the Shipping Act, 46 U. S. C. § 816,[9] to assess charges against the vessel when the cargo was not in free time [10] at the start of the strike.

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[8] *Boston Shipping Assn.* v. *Port of Boston Marine Terminal Assn.*, 10 F. M. C. 409, 414 (1967).

[9] "No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 46 U. S. C. § 816.

[10] The Commission also held that the shift in the incidence of the charge did not conflict with the rights and duties of a carrier under the regular legally binding tariff. It found a pre-existing duty on the carrier not only to deposit the cargo on the pier but also to arrange for the consignee to have access to the cargo and sufficient time, *i. e.*, free time, to remove it.

On September 19, 1967, the Shipping Association petitioned the Court of Appeals for the District of Columbia Circuit for review. But since the petition was filed after the expiration of the 60-day period specified in the Administrative Order Review Act, 28 U. S. C. § 2344, the petition was dismissed as untimely. On September 4, 1968, Rederiaktiebolaget Transatlantic, respondent here and one of the carrier-vessels that had been assessed charges, filed an application with the Commission for reconsideration. Transatlantic claimed that it had been represented by an agent [11] in the proceeding brought by the Shipping Association and thus had standing to request rehearing. Transatlantic urged that the Commission's decision was inconsistent with this Court's intervening decision in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U. S. 261 (1968), in that the Commission had held the tariff change could be effective without prior approval. The Commission did not, however, pass on the claim but returned the petition as untimely under its Rules of Practice and Procedure.[12]

Transatlantic did not seek direct judicial review of the Commission's denial of the application for rehearing. Instead, it moved to intervene [13] in the action still pending in the District Court. Transatlantic argued that its

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[11] Transatlantic's petition for reconsideration stated that "[i]t is represented in Boston by its Agent, Furness, Withy & Co." and that "Furness, Withy is a member of . . . Shipping . . . which, with its member lines, filed the complaint in this proceeding [before the Commission]." The petition further stated that the Terminal Association claimed the sums "from Furness, Withy as agent of petitioner under the disputed tariff provisions."

[12] Petitions for reconsideration are required to be filed within "30 days after issuance of a final decision or order by the Commission . . . ." 46 CFR § 502, 261.

[13] See Fed. Rule Civ. Proc. 24 (a).

agent had provided inadequate representation and that it would be liable for a substantial portion of any judgment rendered against the agent. Intervention was granted. The District Court refused, however, to review the merits of the Commission's decision and rendered judgment against the Shipping Association and Transatlantic.[14]

Transatlantic, the only defendant to appeal, was more successful in the Court of Appeals for the First Circuit. That court concluded that Transatlantic was not a party to the Commission proceeding and, therefore, was free to seek independent collateral review of the merits of the Commission's order in the District Court. The Court of Appeals also accepted Transatlantic's position on the merits and reversed,[15] concluding that the Commission's ruling was indeed inconsistent with *Volkswagenwerk*.

## I

Transatlantic argues that the District Court erred at the outset in referring the case to the Commission. But this Court recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). The doctrine of primary jurisdiction has become one of the key judicial switches through

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[14] The judgment entered by the District Court did not specify Transatlantic as one of the parties-defendant directly liable to the terminal operators. It did, however, provide that Transatlantic's agent, Furness, Withy & Co., was liable for $10,708.87. It is claimed that Transatlantic will be liable for $8,154.85 of this amount.

[15] *Port of Boston Marine Terminal Assn.* v. *Boston Shipping Assn., Inc.*, 420 F. 2d 419 (CA1 1970).

which this current has passed.[16] When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved. *Whitney National Bank* v. *Bank of New Orleans*, 379 U. S. 411, 425 (1965). *Far East Conferences* v. *United States*, 342 U. S. 570, 574–575 (1952).

This is an almost classic case for engaging the doctrine. Plainly, the Federal Maritime Commission is primarily responsible for supervising these conferences of marine terminal operators. Just five years earlier, the Commission approved the very agreement that established the basic pattern of this conference's operation, and the scope of this same agreement was the subject of the present dispute. The Commission was uniquely qualified to consider the dispute in light of the overall policies concerning terminal conferences and the conferences' relationship with both carrier-vessels and consignees. The District Court did not err in determining, for purposes of this litigation, that an article III court, acting on a single, isolated case-and-controversy record in a private suit in which neither the Commission nor the Government was a party, would lack the requisite capacity. *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387, 402–404 (concurring opinion) (CA5 1969).

## II

The District Court also concluded correctly that it was without authority to review the merits of the Commission's decision. The Administrative Orders Review

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[16] *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622, 625 (CA2 1950); 3 K. Davis, Administrative Law §§ 19.01–19.07 (1958); Jaffe, Primary Jurisdiction Reconsidered: The Anti-Trust Laws, 102 U. Pa. L. Rev. 577 (1954).

Act is explicit: "The court of appeals has exclusive jurisdiction to . . . determine the validity of

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(3) such final orders of the Federal Maritime Commission . . . ." 28 U. S. C. § 2342. *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 613 (1966); *Far East Conference* v. *United States*, 342 U. S. 570, 577 (1952).

It is true that § 31 of the Shipping Act, 46 U. S. C. § 830, states that "except as herein otherwise provided" the procedures governing suits to "enforce, suspend, or set aside in whole or in part any order of the [Federal Maritime Commission]" [17] shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission. It is also true that in 1964 Congress provided that when courts refer questions to the Interstate Commerce Commission the referring court shall have exclusive jurisdiction to review orders arising from the referral. 28 U. S. C. § 1336 (b).[18]

This Court in *Consolo* pointed out,[19] however, that the requirement of § 31 was subject to special provisions applicable to maritime cases "such as the provision in § 2 of the Administrative Orders Review Act that direct review proceedings shall be conducted in the courts of appeals rather than the district courts." 383 U. S., at

[17] The agency entrusted with the duty of administering the Shipping Act has undergone many reorganizations and concomitant name changes since its creation in 1916.

[18] "When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral." 28 U. S. C. § 1336 (b).

[19] *Volkswagenwerk*, the basis for Transatlantic's claim that the Commission erred, was referred to the Commission by a district court and the Commission's order was attacked directly in the Court of Appeals. 390 U. S., at 266–267.

613. See *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947 (CA2 1954), cert. denied 348 U. S. 839. Moreover, in the legislative history of the special statute providing for review of cases referred to the Commerce Commission, there is not even a hint that Congress thought of the Maritime Commission while considering the problem. And to make the procedure adopted there applicable to maritime cases would vitiate the scheme of the Administrative Orders Review Act—a scheme designed to ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed. 28 U. S. C. § 2348.

Transatlantic argues that even if the Administrative Orders Review Act provides the exclusive method for reviewing final orders of the Maritime Commission, the Commission's order here was not a final order. But its argument that the order lacked finality because it had no independent effect on anyone and resembled an interlocutory court order denying a motion to dismiss a complaint has the hollow ring of another era.[20] Agency orders that have no independent coercive effect are common. See *Frozen Food Express* v. *United States*, 351 U. S. 40, 44 (1956). Moreover, the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U. S. 576, 602 (1965); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143 (1939).

Here there was no possible disruption of the administrative process; there was nothing else for the Com-

[20] See, *e. g.*, *Muskrat* v. *United States*, 219 U. S. 346 (1911). See generally, 3 K. Davis, *supra*, at § 21.01–21.10.

mission to do. And certainly the Commission's action was expected to and did have legal consequences.

The final proffered argument to justify a collateral attack on the Commission's order is that Transatlantic was not a party to the proceedings before the Commission and not bound by the Commission's action. Although Transatlantic was not named as a party, it was in fact represented before the Commission and has previously made numerous claims to party status.[21] In the petition for reconsideration filed with the Commission, it asserted that it had been represented in the administrative evidentiary proceeding through its agent. The claim was also made in support of the motion to intervene in the resumed district court proceedings. There Transatlantic alleged that "at all times" prior to the filing of the petition for reconsideration with the Commission it "had been represented by counsel for" its agent and claimed that this representation was inadequate.

Even if Transatlantic was not a formal party its interests were clearly at stake. And it had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals. It chose not to do so. Certainly, from this posture, it cannot force collateral redetermination of the same issue in a different and inappropriate forum. *United States* v. *Western P. R. Co.*, 352 U. S. 59, 69 (1956).

## III

Since the time for Court of Appeals review had run, the decision of the Federal Maritime Commission had become final when the case returned to the District Court. After that return neither the District Court nor any Court of Appeals nor this Court had or has authority to review the merits of that decision.

*Reversed.*

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[21] See n. 11, *supra*.